





Charles Francis Adams.

ADAMS 92.10 v.1



*John Adams 1760.
John Quincy Adams 1800.
George Washington Adams 1825.*

HISTORIA PLACITORUM CORONÆ.

THE
HISTORY
OF THE
Pleas of the Crown,

By Sir *MATTHEW HALE* Knt.
sometime Lord Chief Justice of the
Court of King's Bench.

Now first published from his Lordship's Original Manuscript, and the several References to the Records examined by the Originals, with large Notes.

By *SOLLOM EMLYN* of *Lincoln's-Inn* Esq;

To which is added
A Table of the Principal Matters.

In Two Volumes.

VOL. I.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Assigns of *Edward Sayer*, Esq;) for *J. Gyles* over-against *Grays-Inn* in *Holborn*, *C. Woodward* at the Half-Moon between the Two *Temple-Gates* in *Fleet-street*, and *C. Davis* in *Pater-noster-row*.

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ADAMS 92-10
v.1

Extract from the Journal of the
House of Commons.

Luna 29^o die Novemb. 1680.

Orderd, That the Executors of Sir *Matthew Hale*, late Lord Chief Justice of the court of King's Bench, be desired to print the MSS. relating to the Crown-law, and that a committee be appointed to take care in the printing thereof, and it is referred to

Sir <i>Will. Jones</i> ,	Mr. <i>Sacheverel</i> ,
Serj. <i>Maynard</i> ,	Mr. <i>Geo. Pelham</i> ,
Sir <i>Fra. Winnington</i> ,	Mr. <i>Paul Foley</i> .

TO the RIGHT HONOURABLE

Sir JOSEPH FEKYL Knt.

MASTER of the ROLLS,

And One of his Majesty's most
Honourable Privy-Council.

S I R,

AS it is to you that the public are indebted for rescuing this valuable work from the obscurity wherein it had long lain, the preparing of which for the press you were pleased to commit to my care, I thought it became me to inscribe your name on that, to which you are so justly intitled: Nor know I any to whom it could with greater propriety be address'd, than to one, who bears so near a resemblance to the author in those great and good qualities, for which he was so deservedly esteemed.

An unblemished integrity and upright conduct in every character of life, whether as a private person, a senator, or a judge; A generous frankness and open sincerity in conversation; An unalterable adherence in all stations to the principles of civil and religious liberty, accompanied with a serious regard to true piety and virtue; A firm attachment to our constitution in times of the greatest difficulty and danger; A disinterested zeal for the welfare of mankind, manifested by
unwearied

The DEDICATION.

unwearied labours for the public good, uninfluenced by the spirit of a party or any sinister motive, are excellencies, which no less eminently distinguish you than they did the author of this treatise; and as they procured him such a lasting veneration and esteem, so while the same causes are productive of the same effects, they will in like manner transmit your memory to after-times with honour and renown.

To enlarge upon this subject, how agreeable soever to others, would I know be offensive to you, who are more regardful of the approbation of your own mind, than any outward applauses, and while you are intent upon really being and doing good, are no less studious to avoid all ostentatious shews of it. I shall therefore only add, that I am,

S I R,

With great respect,

Your Honour's

Most obedient

Humble servant,

Sollom Emlyn.

T H E
P R E F A C E.

THE following treatise being the genuine offspring of that truly learned and worthy judge Sir *Matthew Hale* (a) stands in need of no other recommendation, than what that great and good name will always carry along with it.

Whoever is in the least acquainted with the extensive learning, the solid judgment, the indefatigable labours, and above all the unshaken integrity of the author, cannot but highly esteem whatever comes from so valuable an hand.

Being brought up to the profession of the law he soon grew eminent in it, discharging his duty therein with great courage and faithfulness and tho he lived in critical times, when disputes ran so high between king and parliament, as at last broke out into a civil war, yet he engaged in no party, but carried himself with such moderation and evenness of temper, as made him loved and courted by all.

It was this great and universal esteem he was then in, that made *Cromwel* so desirous to have him for one of his judges, which offer he would willingly have declined. Being prest by *Cromwel* to give his reason

[A] he

(a) He was born at *Alderley* in *Gloucestershire*, Nov. 1, 1609.

Was enterd at *Magdalen-Hall* in *Oxford* in the 17th year of his age.

Admitted of *Lincolns-Inn*, Nov. 8, 1629.

Made a Judge of the court of *Common Pleas* 1653.

Lord Chief Baron of the Court of *Exchequer*, Nov. 7, 1660.

And at last Lord Chief Justice of the court of *King's Bench* May 18, 1671.

Which place he resigned Feb. 20, 1675-6.

And died the *Christmas* following, Dec. 25, 1676.

he at last plainly told him, that he was not satisfied with the lawfulness of his authority, and therefore scrupled the accepting any commission under it, to which *Cromwel* replied, that since he had got the possession of the government, he was resolved to keep it, and would not be argued out of it; that however it was his desire to rule according to the laws of the land, for which purpose he had pitcht upon him as a proper person to be employed in the administration of justice, yet if they would not permit him to govern by red gowns, he was resolved to govern by red coats.

Upon this consideration, as also of the necessity there at all times is, that justice and property should be preserved, he was prevailed with to accept of a judge's place in the court of common-pleas, wherein he behaved with great impartiality, constantly avoiding the being concerned in any state-affair, and tho for the first two or three circuits he sat indifferently on the plea-side or the crown-side, yet afterwards he absolutely refused to sit on the crown-side, thinking it the safer course in so dubious a case.

But notwithstanding his dislike to *Cromwel's* government, yet this did not drive him, as it did some others, into the extremes of the contrary party; for upon the restoration, of which he was no inconsiderable promoter, he was not for making a surrender of all, and receiving the king without any restrictions; on the contrary he thought this an opportunity not to be lost for limiting the prerogative, and cutting off some useless branches, that served only as instruments of oppression, for which purpose he moved, as bishop *Burnet* relates (b), " That a committee might be appointed to look into the propositions that had been made, and the concessions that had been offered

(b) *Burnet's* hist. of own times, Vol. I. p. 88.

“ferd by the late king; and from thence to digest
“such propositions, as they should think fit to be sent
“over to the king.

This motion was seconded, and tho through general *Monk*'s means it faild of success, yet it shewed our author's tender regard for the liberties of the subject, and that he was far from being of a mind with those, who lookt on every branch of the prerogative as *jure divino* and indefeasible.

But notwithstanding this attempt, which shewed he was not cut out for such compliances, as usually render a man acceptable to a court, yet such was his unblemished character, that it was thought an honour to his majesty's government to advance him first to the station of Lord Chief Baron, and afterwards to that of Lord Chief Justice of the king's bench; nor indeed could so great a trust be lodged in better hands.

When he was first promoted, the Lord Chancellor *Clarendon* upon delivering to him his commission told him among other things, “That if the king could
“have found out an honest or fitter man for that im-
“ployment, he had not advanced him to it, and that
“he had therefore preferd him, because he knew
“none, that deserved so well (c).

He behaved in each of these places with such uncorrupt integrity, such impartial justice, such diligence, candor, and affability, as justly drew the chief practice after him, whithersoever he went; he constantly shund not only the being corrupt, but every thing which had any appearance, or might afford the least suspicion of it; he was sincerely bent on discovering the truth and merits of a cause, and would therefore bear with the meanest counsel, supply the defects of the pleader, and never take it amiss, when summing up the evidence, to be reminded of any circumstance

(c) *Burnet's life of Hale, Edit. 1682. p. 53.*

cumstance he had omitted, for being in a high degree possess'd of that qualification so peculiarly necessary to a judge, I mean patience, (without which the most excellent talents may become insignificant,) no considerations of his own convenience could prevail with him to hurry over a cause, or dispatch it without a thorough examination, for which reason he made it a rule, especially upon the circuits, to be short and sparing at meals, that he might not either by a full stomach unfit himself for the due discharge of his office, or by a profuse waste of time be obliged to put off, or precipitate the business that came before him.

He was a great lamenter of the divisions and animosities, which raged so fiercely at that time among us, especially about the smaller matters of external ceremonies, which he fear'd might in the end subvert the fundamentals of all religion: And tho he thought the principles of the non-conformists too narrow and strait-laced, yet could he by no means approve the penal laws, which were then made against them; he knew many of them to be sober, peaceable men, who were well affected to the government, and had shewn as much dislike as any to the late usurpation, and therefore he thought they deserved a better treatment; besides he lookt on it as an infringement on the rights of conscience, which ought always to be held sacred and inviolable, and therefore used to say, that the only way to heal our breaches was a *new act of uniformity*, for which purpose he concurd with Lord Keeper *Bridgman* and Bishop *Wilkins* in setting on foot a scheme for the comprehension of the more moderate dissenters, and an indulgence towards others, and drew the same up into the form of a bill, altho by a vote of the house of commons it was prevented from being laid before the parliament.

Tho by this means he was hinderd from obtaining a repeal of those laws, yet could he never be brought to give any countenance to the execution of them. I have heard it credibly related, that once when he was upon the circuit there happend to be a grand jury, who thought to make a merit of presenting a worthy peaceable non-conformist that liv'd in their neighbourhood; upon this occasion our judge could not avoid reprimanding them for their ill-placed zeal, which vented itself this way, while no notice was taken of the prophaneness, drunkenness, and other immoralities, which abounded daily amongst them; in short, he told them, that if they were resolved to persist, he would remove the affair to *Westminster-Hall*, and if he could not then prevail to have a stop put to it, he would resign his place, for he had told the king when he first accepted it, that if any thing was prest upon him, which was against his judgment, he would quit his post.

He always retaind a serious impression of religion, and in particular was a punctual observer of any vow or engagement he had laid himself under. Having in his younger days on a particular occasion made a vow never to drink an health again, he could never be prevaild on upon any consideration to dispense with it, altho drinking healths was then grown to be the fashionable loyalty of the times.

And thus in every character of life he was a pattern well worthy of imitation: in short, he was a public blessing to the age he lived in, and not to that only, but by his bright and amiable example to succeeding generations; for as a pattern of virtue and goodness will always be a silent, tho sharp reproof to those who deviate from it, so to noble and generous minds it will not fail of being a mighty spur and incentive to

the imitation of it, and by that means leave a real and lasting, tho' secret influence behind it.

As he justly merited the esteem of all, so in particular he has well deserved of the profession of the law, to which he was so shining an ornament; he contributed more by his example to the removal of the vulgar prejudices against them, than any argument whatever could do.

The great Archbishop *Usher* had entertain'd some prejudices of that kind, but by conversation with our author and the learned *Selden*, he was convinc'd of his mistake; our author declaring, "That
" by his acquaintance with them he believed there
" were as many honest men among the lawyers pro-
" portionably, as among any profession of men in
" *England*."

Never was the old monkish maxim, *Bonus Jurista malus Christa*, more thoroughly confuted than by his example, he demonstrated by a living argument, how practicable it was to be both an able lawyer and a good christian; indeed he saw nothing in the one that was any way incompatible with the other, nor did he think, that an unaffected piety sat with an ill grace on any, be his station never so high, or his learning never so great; for tho' he diligently applied himself to the business of his profession, yet would he never suffer it so to engross his time as to leave no room for matters of a more serious concernment, as may appear from the many tracts he has wrote on moral and religious subjects.

For this reason, when he found the decays of nature gaining ground upon him, he could no longer be prevail'd with to suspend the resolution he had taken to resign his place, that after the example of that great emperor *Charles V.* he might have an

interstice between the business of life and the hour of death (*d*).

No wonder then that one so great, so good, should be loved and esteemed while living, should be revered and admired when dead; no wonder the king should be loth to part with him, who had been such a credit to his government; tho had he held his place some few years longer, such a scene of affairs did then open, as in all likelihood would have greatly distressed him how to behave, as well as the court how to get rid of one, who could not have been removed without great reproach, nor continued without great obstruction to the violent measures, that were then pursued.

But it is time to stop, for I mean not to write the history of his life, this would require a volume of it self, and is long ago performed by an able hand (*e*); I shall therefore only subjoin his character as drawn by that learned prelate and other eminent cotemporaries, by which it will appear, that future times cannot out-go his own in the veneration and esteem they bore him.

The bishop expresses it in short thus, “ That he was
 “ one of the greatest patterns this age has afforded,
 “ whether in his private deportment as a christian, or
 “ in his public employments, either at the bar or on
 “ the bench (*f*) ”; having given it more at large (*g*)
 in the words of a noble person, whom he styles one
 of the greatest men of the profession of the law (*h*),
 “ He would never be brought to discourse of public
 “ matters in private conversation, but in questions of
 “ law when any young lawyer put a case to him he
 “ was very communicative, especially while he was at
 “ the

(*d*) *Inter vite negotia & mortis di-
 em oportere spatium intercedere.* Stra-
 da de bello Belgico, Vol. I. sub anno
 1555.

(*e*) Bp. Burnet.

(*f*) p. 218.

(*g*) p. 172.

(*h*) Supposed to be the then earl of
 Nottingham.

“ the bar: But when he came to the bench, he grew
 “ more reserved, and would never suffer his opinion in
 “ any case to be known, till he was obliged to declare
 “ it judicially; and he conceald his opinion in great
 “ cases so carefully, that the rest of the judges in the
 “ same court could never perceive it; his Reason was,
 “ *because every judge ought to give sentence according to*
 “ *his own persuasion and conscience, and not to be swayed*
 “ *by any respect or deference to another man’s opinion:*
 “ And by this means it happend sometimes, that when
 “ all the barons of the Exchequer had deliverd their
 “ opinions, and agreed in their reasons and argu-
 “ ments, yet he coming to speak last, and differing
 “ in judgment from them, hath exprest himself with
 “ so much weight and solidity, that the barons have
 “ immediately retracted their votes and concurred with
 “ him. He hath sat as a judge in all the courts of
 “ law, and in two of them as chief, but still where
 “ ever he sat, all business of consequence followed
 “ him, and no man was content to sit down by the
 “ judgment of any court, till the case was brought
 “ before him, to see whether he were of the same
 “ mind, and his opinion being once known, men did
 “ readily acquiesce in it; and it was very rarely seen,
 “ that any man attempted to bring it about again, and
 “ he that did so, did it upon great disadvantages, and
 “ was always lookt upon as a very contentious per-
 “ son; so that what *Cicero* says of *Brutus*, did very
 “ often happen to him, *Etiam quos contra statuit,*
 “ *æquos placatosque dimisit.*

“ Nor did men reverence his judgment and opinion
 “ in courts of law only; but his authority was as great
 “ in courts of equity, and the same respect and sub-
 “ mission was paid him there too; and this appeard
 “ not only in his own court of equity in the Exche-
 “ quer-chamber, but in the Chancery too, for thither

“ he was often called to advise and assist the lord chan-
“ cellor, or lord keeper for the time being; and if
“ the cause were of difficult examination, or intri-
“ cated and entangled with variety of settlements, no
“ man ever shewed a more clear and discerning judg-
“ ment: If it were of great value, and great persons
“ interested in it, no man shewed greater courage and
“ integrity in laying aside all respect of persons:
“ When he came to deliver his opinion, he always
“ put his discourse into such a method, that one part
“ of it gave light to the other, and where the pro-
“ ceedings of Chancery might prove inconvenient to
“ the subject, he never spared to observe and reprove
“ them: And from his observations and discourses, the
“ Chancery hath taken occasion to establish many of
“ those rules by which it governs it self at this day.

“ He did look upon equity as a part of the com-
“ mon Law, and one of the grounds of it; and there-
“ fore as near as he could, he did always reduce it to
“ certain rules and principles, that men might study it
“ as a science, and not think the administration of it
“ had any thing arbitrary in it. Thus eminent was this
“ man in every station, and into what court soever he
“ was called, he quickly made it appear, that he de-
“ served the chief seat there.

“ As great a lawyer as he was, he would never suffer
“ the strictness of law to prevail against conscience;
“ as great a chancellor as he was, he would make use
“ of all the niceties and subtilties in law, when it
“ tended to support right and equity. But nothing
“ was more admirable in him, than his patience: He
“ did not affect the reputation of quickness and dis-
“ patch, by a hasty and captious hearing of the coun-
“ sel: He would bear with the meanest, and gave eve-
“ ry man his full scope, thinking it much better to lose
“ time than patience: In summing up of an evidence

“ to a jury, he would always require the bar to inter-
 “ rupt him if he did mistake, and to put him in mind
 “ of it, if he did forget the least circumstance; some
 “ judges have been disturbed at this as a rudeness,
 “ which he always lookt upon as a service and re-
 “ spect done to him.

“ His whole life was nothing else but a continual
 “ course of labour and industry, and when he could
 “ borrow any time from the public service, it was
 “ wholly employd either in philosophical or divine
 “ meditations, and even that was a public service too,
 “ as it hath proved; for they have occasiond his writ-
 “ ting of such treatises as are become the choicest
 “ entertainment of wise and good men, and the world
 “ hath reason to wish that more of them were print-
 “ ed: He that considers the active part of his life,
 “ and with what unwearied diligence and application
 “ of mind he dispatched all mens business, which
 “ came under his care, will wonder how he could find
 “ any time for contemplation: He that considers again
 “ the various studies he pass thro, and the many col-
 “ lections and observations he hath made, may as
 “ justly wonder how he could find any time for ac-
 “ tion: But no man can wonder at the exemplary pie-
 “ ty and innocence of such a life so spent as this was,
 “ wherein as he was careful to avoid every idle word,
 “ so it is manifest he never spent an idle day. They,
 “ who came far short of this great man, will be apt
 “ enough to think that this is a panegyric, which in-
 “ deed is a history, and but a little part of that histo-
 “ ry which was with great truth to be related of him.
 “ Men, who despair of attaining such perfection, are
 “ not willing to believe that any man else did ever ar-
 “ rive at such a height.

“ He was the greatest lawyer of the age, and might
 “ have had what practice he pleased, but tho he did

“ most conscientiously affect the labours of his profes-
“ sion, yet at the same time he despised the gain of
“ it, and of those profits which he would allow him-
“ self to receive he always set apart a tenth penny for
“ the poor, which he ever dispensed with that secre-
“ cy, that they who were relieved, seldom or never
“ knew their benefactor: He took more pains to avoid
“ the honours and preferments of the gown, than
“ others do to compass them. His modesty was be-
“ yond all example, for where some men who never
“ attaind to half his knowledge, have been pufft up
“ with a high conceit of themselves, and have affect-
“ ed all occasions of raising their own esteem by de-
“ preciating other men, he on the contrary was the
“ most obliging man that ever practised: If a young
“ gentleman happend to be retaind to argue a point
“ in law, where he was on the contrary side, he
“ would very often mend the objections when he
“ came to repeat them, and always commend the gen-
“ tleman, if there were room for it, and one good
“ word of his was of more advantage to a young man,
“ than all the favour of the court could be ”.

Upon the promotion of lord chief justice *Rainsford*, who succeeded him in that office, the then lord chancellor exprest himself thus, (i) “ The vacancy of
“ the seat of the Chief Justice of this court, and that
“ by a way and means so unusual, as the resignation
“ of him, that lately held it, and this too proceed-
“ ing from so deplorable a cause as the infirmity of
“ that body, which began to forsake the ablest mind
“ that ever presided here, hath filled the kingdom
“ with lamentations, and given the king many and
“ pensive thoughts how to supply that vacancy a-
“ gain, ” and then addressing himself to his successor,
“ the very labours of the place, and that weight and
“ fatigue

(i) *Burnet p. 213, 217.*

“ fatigue of business, which attends it, are no small
 “ discouragements; for what shoulders may not justly
 “ fear that burden, which made him stoop, that went
 “ before you? Yet I confess you have a greater dis-
 “ couragement than the mere burden of your place,
 “ and that is the unimitable example of your prede-
 “ cessor; *Onerosum est succedere bono principi* was the
 “ saying of him in the panegyric, and you will find
 “ it so too, that are to succeed such a chief justice,
 “ of so indefatigable an industry, so invincible a pa-
 “ tience, so exemplary an integrity, and so magnani-
 “ mous a contempt of wordly things, without which
 “ no man can be truly great, and to all this a man that
 “ was so absolute a master of the science of the law,
 “ and even of the most abstruse and hidden parts of
 “ it, that one may truly say of his knowledge of the
 “ law, what St. *Austin* said of St. *Hierom's* knowledge
 “ in divinity, *Quod Hieronymus nesciuit, nullus mortali-
 “ lium unquam scivit.* And therefore the king would
 “ not suffer himself to part with so great a man, till
 “ he had placed upon him all the marks of bounty
 “ and esteem, which his retired and weak condition
 “ was capable of ”.

To this the new chief justice, speaking of his predecessor, answered in the following words.

“ ——— A person in whom his eminent virtues and
 “ deep learning have long managed a contest for the
 “ superiority, which is not decided to this day, nor
 “ will it ever be determined I suppose, which shall
 “ get the upperhand: A person that has sat in this
 “ court many years, of whose actions there I have
 “ been an eye and ear witness, that by the greatness
 “ of his learning always charmed his auditors to reve-
 “ rence and attention: A person of whom I think I
 “ may boldly say, that as former times cannot shew
 “ any superior to him, so I am confident succeeding

“ and future time will never shew any equal. These
 “ considerations heightend by what I have heard from
 “ your lordship concerning him made me anxious and
 “ doubtful, and put me to a stand how I should suc-
 “ ceed so able, so good, and so great a man: It doth
 “ very much trouble me, that I, who in comparison
 “ of him am but like a candle lighted in the sun-
 “ shine, or like a glow-worm at mid-day, should suc-
 “ ceed so great a person, that is and will be so emi-
 “ nently famous to all posterity, and I must ever wear
 “ this motto in my breast to comfort me, and in my
 “ actions to excuse me,

“ *Sequitur, quamvis non passibus aequis.*

Mr. *Baxter*, with whom our author was very intimate towards the latter part of his life, describes him in these words (k), “ Sir *Matthew Hale*, that unwearied
 “ student, that prudent man, that solid philosopher,
 “ that famous lawyer, that pillar and basis of justice,
 “ who would not have done an unjust act for any word-
 “ ly price or motive, the ornament of his majesty’s go-
 “ vernment, and honour of *England*, the highest fa-
 “ culty of the soul of *Westminster-Hall*, and pattern to
 “ all the reverend and honourable judges; That godly
 “ serious practical christian, the lover of goodness and
 “ all good men, a lamenter of the clergies selfishness
 “ and unfaithfulness and discord, and of the sad divi-
 “ sions following hereupon, an earnest desirer of their
 “ reformation, concord, and the church’s peace, and
 “ of a reformed act of uniformity, as the best and ne-
 “ cessary means thereto; That great contemner of the
 “ riches, pomp and vanity of the world; That pattern
 “ of honest plainness and humility, who while he
 “ fled from the honour, that pursued him, was yet
 “ Lord Chief Justice of the King’s-bench, after being

[D]

“ long

(k) *Baxter’s* notes on Lord *Hale’s* life, p. 43.

“ long Lord Chief Baron of the Exchequer; living
 “ and dying, entring on, using, and voluntarily sur-
 “ rendring his place of judicature with the most uni-
 “ versal love, honour and praise, that ever did *English*
 “ subject in this age, or any that just history doth ac-
 “ quaint us with, &c. &c. &c. ”

Thus far for the author.

As to the work it self, if any of our author's performances might challenge the precedence of the rest, this seems to have the justest claim to it, as being a favourite work, which he often reviewd, and was at vast pains and charge in furnishing himself with proper materials for.

His compassionate concern for the lives and liberties of mankind on the one hand and for preserving the public peace and tranquillity on the other had possesst him with an opinion of the high importance, that the pleas of the crown, especially those relating to capital offenses, should be reduced to certain rules, and those rules clearly and plainly understood, that so there might be as little room left as possible either for erring in or perverting of judgment.

It was this led him to make the crown-law his principal study, to which he applied himself with great assiduity, for as bishop *Burnet* speaking of this treatise informs us (l), “ It was by much searh and long
 “ observation he composed that great work concern-
 “ ing it ”. The same author acquaints us (m), that he had begun his collections relating hereto in the reign of King *Charles I.* “ but after the king was mur-
 “ derd he laid them by, and that they might not fall
 “ into ill hands, he hid them behind the wainscotting
 “ of his study, for he said, *there was no more occasion*
 “ *to use them, till the king should be again restored to*
 I “ his

(l) p. 90. (m) p. 39.

“ *his right*, and so upon his majesty’s restoration he
 “ took them out, and went on in his design to perfect
 “ that great work. ”

Hence it appears highly probable, that he intended this work for the public, altho the business of his station did not afford him leisure to publish it during his life; however about four years after his death the house of Commons took singular notice of it, and thought it a work of such consequence, as to pass a vote (*n*) desiring his executors to print it, and appointed a committee to take care thereof, but that parliament being soon after dissolved (*o*) this design dropt.

Some years since there was published a treatise, intituled, *Pleas of the Crown* by Sir Matthew Hale, but this was only a plan of this work, containing little more than the heads or divisions thereof, concerning which the editor in his preface expresses himself thus, “ He [our author] hath written a large work upon this subject, intituled, *An History of the Pleas of the Crown*, wherein he shews what the law anciently was in these matters, what alterations have from time to time been made in it, and what it is at this day; He wrote it *on purpose to be printed*, finished it, had it all transcribed *for the press* in his life-time, and had revised part of it after it was transcribed. ”

It is therefore to be hoped, the publication hereof will not be thought any way to interfere with the direction of his will, *That none of his MSS should be printed after his death, except such as he should give order for during his life*, his intention for printing it being so apparent, as may well amount to an order for so doing.

Besides as bishop *Burnet* observes (*p*), this prohibitory clause in the will seems in some measure to be revoked by his codicil, wherein he orders, *that if any book*

(*n*) Nov. 29. 1680.

(*o*) Jan. 18. 1680.

(*p*) p. 185.

book of his writing should be printed, then what should be given as a consideration for the copy should be divided, &c. a kind of implication, that he had left the printing thereof to the discretion of his executors.

The abovementiond writer further observes (q), that his unwillingness to have any of his works printed after his death proceeded from an apprehension, lest they should undergo any expurgations or interpolations in the licensing them, for *this, he said, might in matters of law prove to be of such mischievous consequence, that he was resolved none of his writings should be at the mercy of the licensers.*

But as there is no such thing required by the laws now in being, that reason is at an end, and the reader may be assured that the edition here offerd to the publick is printed faithfully from the author's original manuscript.

This manuscript consists of one thick folio volume all in our author's own hand-writing, from whence it was transcribed in his life-time, and the transcript has since been bound up in seven small volumes in folio.

It had been by him revised as far as *Chap. 27.* in the first part, *viz.* about the middle of the third volume, as appears from many interlineations and additions in his own hand; the corrections in the remaining part are in another (very modern) hand, and in some places not very agreeable to the scope of the argument.

This transcript therefore so far as revised and corrected by our author (and no farther) may be deemed the original finished and perfected, but since even in this part there are in some places leaves taken out and others inserted in their room in a different hand, unauthenticated by our author, and sometimes quite disturbing the coherence and connexion of the discourse,

course, it was not thought warrantable to consider such interpolations as a part of this treatise, for as it cannot be doubted but great regard will be always paid to the performance of so esteem'd an author, it is a piece of justice due both to the author and the public, that nothing should be herein inserted, but what is undeniably his, and carries evident marks of being by him intended as part of this work.

The title hereof was named by our author himself *Historia Placitorum Coronæ*, for he intended, as appears from the *Proemium*, to have taken in the whole body of the crown-law, as well in relation to matters civil, as matters criminal, for which purpose he once design'd to have added two more books upon this subject, the one concerning offenses not capital, the other touching franchises and liberties, but to the great detriment of the public neither of these appears ever to have been compos'd by him, so that as it now stands it treats only of offenses capital, which is indeed the most important branch of the crown-law, being what most nearly affects the life and liberty of the subject; besides in treating hereof he has unavoidably explain'd many incidental matters equally applicable to offenses not capital.

The *first* part of this work relates to the nature of the offenses, *viz.* the several kinds of *treason*, *heresy* and *felony*; the second of these, *heresy*, being an offense of a spiritual nature, of which it was not our author's purpose to treat, was at first wholly omitted by him, but afterwards considering, as I suppose, that by its being circumscribed by act of parliament, *viz.* 1 *Eliz.* it became an offense of temporal cognizance, he thought proper to insert a chapter upon that head.

The *second* part relates to the manner of proceeding against offenders, wherein are consider'd the jurif-

diction of the several courts, the manner of apprehending, committing, bailing, and arraigning offenders, their several pleas, bringing them to trial, judgment, and execution.

Having thus given some general account of the author and the work, it will be proper in the next place to acquaint the reader with the part I have had in this edition, which has been to supervise the printing thereof that it be agreeable to our author's manuscript, which being written in a very obscure hand might by one wholly unacquainted with the law have been frequently mistaken.

To make this work the more authentic the several references herein made to the records have been compared with the originals at the respective offices in the *Tower* and *Westminster*.

I have also carefully examined the several quotations from the year-books, reports, &c. many of which being quoted without folio or page or else mis-quoted have with no small trouble been supplied and rectified, for our author not having always had leisure to consult the books themselves has frequently copied from the mis-printed quotations in the margin of lord *Coke's* third volume of his *Institutes*.

As it cannot be expected but in the writing so large a manuscript some words must *currente calamo* have been omitted or wrong written, I have in some few places taken the liberty to add or alter a word or two to preserve the sense, but have been particularly careful to distinguish such addition or alteration within crotchets, that I might not impose my judgment on the reader, but leave him to judge for himself, whether the drift of our author's reasoning do not require it.

I have likewise subjoind a few notes containing some observations from the records, as also remarking, where the law hath been since explaind by later resolutions, or alterd by subsequent acts of parliament; but as these acts are sometimes very long, consisting of many clauses, the reader is desired to use the same caution here, which is recommended by our author (r) with regard to those recited in the work it self, *viz.* “ that he rely not barely upon the abstracts thereof here given, but peruse the statutes themselves in the “ books at large. ”

I am sensible many slips and omissions must needs have happend in the supervising so large a work of so critical a nature, but hope that will plead my excuse, at least to those, who consider the wide difference between perusing it in a fair print and in a difficult manuscript.

(r) *Part I. p. 261.*

March 30.
1736.

S. Emlyn.

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T H E
P R O E M I U M.

The Method of the Work intended.

HAVING an intention to make a full collection of the *Pleas of the Crown*, I shall divide those pleas into two general tracts.

The *first* concerning pleas of the crown in matters *criminal*.

The *second* concerning pleas of the crown in matters *civil*, namely concerning franchises and liberties.

The former will be the subject of the first and second books, the latter of the third book.

First therefore, I shall begin with the several kinds of *crimes*, that make up the subject matter of my first and second book.

Crimes that are punishable by the laws of *England* are for their matter of two kinds.

1. *Ecclesiastical*.
2. *Temporal*.

The *former* of these, namely such crimes as I call *Ecclesiastical*, are of ecclesiastical cognizance, and tho' all external jurisdiction, as well ecclesiastical as temporal, is derived from

The *P R O E M I U M* to

the crown of *England*, and all criminal proceedings in the ecclesiastical courts are in some kind *Placita coronæ*, suits for the king, and such as he may pardon or discharge, as being his own suits, yet these I shall not meddle with at this time.

The *second* sort, *viz.* *Temporal* crimes, which are offenses against the laws of this realm, whether the common law or acts of parliament, are divided into two general ranks or distributions in respect of the punishments, that are by law appointed for them, or in respect of their nature or degree; and thus they may be divided into capital offenses, or offenses only criminal; or rather and more properly into

Felonies and

Misdemeanors,

because there is no capital offense but hath in it the crime of felony, and yet there be some felonies, that are not in their nature capital, whereof hereafter.

Crimen capitale, or felony in this acceptation is of two kinds, namely

That which is complicated, and hath a greater offense joined with it, namely *Treason*, and

That which is simply *Felony*.

Touching the former of these, namely *Treason*, it is that capital offense, which is committed against some special civil obligation of subjection and faith more than is found in other capital offenses, and therefore it hath the denomination of *proditio*, and the offense is laid to be done *proditoriè*.

This offense of *Treason* is of two kinds, namely

That which is against the highest civil obligation, namely against the king, his crown and dignity, which is called *High-treason*,

Or against some other, to whom a civil obligation of faith is made or implied, which is called *Petit-treason*.

The offenses of high-treason are of two kinds, *viz.*

Such as were treasons by the *common law*, or

Such as were made so by special *acts of parliament*.

The offenses of simple felony are likewise of the same distribution, namely

Historia Placitorum Coronæ.

Such as were felonies at *common law*, and

Such as are by *act of parliament* put into the degree, or under the punishment of felony.

And the same distribution is to be made touching *misdemeanors*, namely they are

Such as are so by the *common law*, or

Such as are specially made punishable as misdemeanors by *acts of parliament*.

This is the general order and distribution of the first and second book of this tractate, namely concerning the matters of the pleas of the crown in criminals, or those crimes, which come under the cognizance of the laws of this kingdom, wherein the prosecution is *pro rege*, or in his name or right, as the common *vindex* of public injuries or crimes.

The particular enumeration of these several offenses is much of the business of those charges, that are given to the grand jury by the justices in their several sessions; and they were for the most part heretofore contained in certain articles or heads of inquiry deliverd out in writing to the several inquests, and were often styled *Capitula placitorum coronæ*, such were those of R. 1. mentiond by *Hoveden* p. 744, 783. which were deliverd to the inquisitors in every wapentach or hundred, and to the justices itinerant to make inquiry upon, and by them to the grand inquests; and such were those *Articuli itineris* declared by *Bracton*, *Lib. III. de coronâ*, cap. 1. and printed in the old *Magna Carta* for the justices in *eyre* to make inquiry upon, which I shall not here repeat at large, but shall take them up as I shall have occasion to use them.

The order, which I shall observe in these *Pleas of the crown* will be this :

I. In the first book I will consider of *capital offenses*, *Treasons* and *Felonies*, which book will be divided into two parts,

1. The

The P R O E M I U M, &c.

1. The *enumeration of the kinds* of treasons and felonies, as well by common law, as by acts of parliament.
2. The whole *method of proceedings* in or upon them.

II. The second book will treat of matters criminal, that are *not capital*; and

III. The third book will be touching *franchises* and *liberties*. (*)

(*) That which is here offerd to the public is only the first of these books, consisting of two parts; the other two

books having, as I have been credibly informed, never been composd by our author.

I

HISTO-

HISTORIA

PLACITORUM CORONÆ.

PART I.

CAP. I.

Concerning Capital Punishments.

BEING to treat concerning capital offenses, it will not be amiss to premise something touching capital punishments.

Laws, that are introduced by custom, or instituted by the legislative authority for the good of civil societies, would be of little effect, unless they had also their sanctions, imposing penalties upon the offenders of those laws.

These penalties are various according to the several natures of the offenses, or the detriment that comes thereby to civil societies; some are only pecuniary; some corporal, but not capital, such as imprisonment, stigmatizing, banishment, servitude, and the like; others are capital, *ultimum supplicium*, or death; and that death sometimes accompanied with greater, sometimes with less degrees of severity.

So that, altho offenses against the good of human society be many of them prohibited by the laws of God and nature, yet the punishments of all such offenses are not determined by the law of nature to this or that particular kind, but are for the most part, if not altogether, left to the positive laws and constitutions of several kingdoms and states.

And therefore, altho most certainly the penalties instituted by God himself among his antient people upon the breach of their laws were with the highest wisdom fitted to that state, and all laws and instituted punishments should come up as near to that pattern, as may be; yet as to the degrees and kinds of punishments of offenses *in foro civili vel judiciario* they are not obliging to all other kingdoms or states, but all states, as well christian as heathen, have varied from them.

And therefore it will not be amiss to instance in the various kinds of punishments inflicted by the several laws of several countries, especially in those two offenses of *homicide* and *theft*, which are the most common and obvious offenses in all countries.

By the antientest divine law, that we read, the punishment of homicide was with death. *Gen. ix. 6. Whosoever sheds man's blood, by man shall his blood be shed. (a)*

And the judicial law given by Moses was pursuant to it, with some temperaments and explanations. *Exod. xxi. 12, 13, 14. He, that smiteth a man, so that he die, shall surely be put to death. And if a man lie not in wait, but God deliver him into his hand; then I will appoint thee a place, whither he shall flee. But if a man come presumptuously upon his neighbour to slay him with guile; thou shalt take him away from mine altar, that he may die. And v. 18, 19. And if men strive together, and one smite another with a stone, or with his fist, and he die not, but keepeth his bed; if he rise again, and walk abroad upon his staff, then shall he, that smote him, be quit; only he shall pay for the loss of his time, and for his cure.*

And what this delivery by God of a man into his neighbour's hand is, is best expounded *Deut. xix. 4, 5, 6, 11, 12. Whofo killeth his neighbour ignorantly, whom he hated not in time past, As where a man cleaveth wood, and the ax flieth from the helve, and killeth a man, he shall fly to the city of refuge (b), lest the*

(a) This law being given to Noah, from whom all men are derived, is not peculiar to the *Israelites*; but, as our author observes below, is binding on all mankind.

(b) Concerning these cities of refuge, see *Exod. xxi. 13. Numb. xxxv. Deut. iv. 41. & seq. Josh. xx, xxi. Selden: de jure naturali, &c. Lib. IV. cap. 2.*

the avenger (c) of blood pursue, and slay him while his heart is hot; whereas he was not worthy of death, in that he hated him not in time past: But if any man hate his neighbour, and lie in wait for him, and rise up against him, and smite him mortally, that he die, and he fleeth to one of those cities, the elders of his city shall send and fetch him thence, and deliver him into the hand of the avenger of blood, that he may die. (d)

Again; *Exod. xxii. 2.* If a thief be found breaking up, and be smitten, that he die, there shall no blood be shed for him: if the sun be risen upon him, there shall blood be shed for him; for he should make full restitution; if he have nothing, then he shall be sold for his theft.

Upon these judicial laws, these things are observable; 1. that by these laws the killing of a man by malice forethought, or upon a sudden falling out, were both under the same punishment of death. (e) 2. That the killing of a man by

(c) Who this avenger of blood was, is no where expressly said, it is generally supposed that he was the next heir to the person slain. See *Selden: de jur. nat. Lib. IV. cap. 1. & de successione in bona defuncti*: but the truth is, the Hebrew words *Goel ha dam*, here render'd the avenger of blood, should be render'd the next of blood, for *Goel* properly signifies one of the same kindred; it is so render'd *Ruth II. 20.* and *III. 9, 12.* and is usually expressed in the septuagint by ἀρχισύωον, which denotes one near of kin.

(d) If there was no avenger of blood, or if he would not or could not kill the slayer, the slayer was capitally punished by a judicial sentence; and no ransom or recompence was admitted. *Numb. xxxv. 31. Selden: de jur. nat. Lib. IV. cap. 1. in fine*; even tho the person slain should before his death desire that the slayer should be forgiven. *Maimonides More Nevochim, Pars III. cap. 41.* for all voluntary homicide was inexcusable, as appears from *Numb. XV. 27.---31.* and the case of *David* in the matter of *Uriah, Psal. LI. 16.* there was one case indeed of capital homicide, wherein a ransom was allowed, viz. If an ox were wont to push with his horn, and it had been testified to his owner, and he had

not kept him in, so that he had killed a man or a woman, the owner was to be put to death, he being look'd on as the author of the murder, who would not prevent it, when he had warning, and might have done it; however, this being a case of gross negligence, rather than wilful malice, he was permitted to redeem his life by paying the ransom, which was laid upon him *Exod. xxi. 29, 30.* The price of a servant was thirty shekels of silver. *Ibid. v. 32.* and that of a freeman was generally double, viz. sixty shekels. *Maimon. More Nevochim, Pars III. cap. 40.*

This was also felony by the common law of *England*, for by such sufferance the owner seem'd to have a will to kill. *Stamf. P. C. 17. Fitz. Cor. 311.*

(e) The law was general, *That whoever smiteth a man, so that he die, shall surely be put to death. Exod. xxi. 12.* There were indeed some exceptions from this general law, but, setting aside the case of an house breaker in the night, they all related to casual involuntary homicides; there is not one exception of a voluntary designed killing, whether sudden or premeditated, (whatever interpretations might be afterwards made by the *Jewish Rabbi's*, who made the commandments of God of none effect thro' their traditions.

by misfortune was not liable to the punishment of death, by the sentence of the judge; but yet the avenger of blood might kill him, before he got to the city of refuge. (f) 3. The killing of a thief in the night was not liable to punishment of death; but if it were in the day-time, it was punishable with death. 4. Tho there is no express law touching killing a man in his own defense (g), yet it seems the custom of the *Jews*, and the interpretation of the *Jewish* doctors, excused that fact from the punishment of death. (h) 5. That the usual manner of the execution of the sentence of death was stoning, and sometimes strangulation. (i)

Now I will consider some of the laws of other nations in reference to *homicide*; wherein tho there is a great analogy in many things between the laws of the *Jews*, and the laws of other countries; so that a man may reasonably collect, that these judicial laws of the *Jews* were taken up by other nations, as the grand exemplar of their judicial laws; yet in some things they departed from them in the particular constitutions and customs of other countries.

Among the *leges Atticæ* collected by Mr. Petit *Lib. VII. tit. 1.* these were many of the laws concerning homicide.

I

Senatus

traditions. *Mat. xv. 6.*) so that there is nothing in the *Jewish* law to countenance the distinction made by the laws of *England* between murder and manslaughter, a distinction, which serves to shew, that tho the laws of *England* be much severer than the other in the case of *theft*, yet they are much milder in the case of *homicide*.

(f) Unless he fled to the altar, which was also look'd on as a place of refuge, it being probable from *Exod. xxi. 13, 14.* that the altar was the place of refuge before the cities of refuge were appointed. See *Selden: de jur. nat. Lib. IV. cap. 2.* If he did escape to the city of refuge, he was obliged to remain there till the death of the high priest, for the avenger of blood might kill him, where-ever he found him out of the borders of the city. *Numb. xxxv. 25.---32. Selden: ubi supra & de Synedriis. Lib. II. cap. 7.* but after the death of the high priest, he was at liberty to go where he would; for the reason hereof see *Maimonides*

More Nevochim, Pars III. cap. 40. and *Answerth on Numbers xxxv. 25.*

(g) This was a case so plainly justifiable by the law of nature, that it needed no positive law; however, the permission to kill a thief, who should be found breaking up in the night, seems to be an express allowance of killing in one's own defense; for the reason of that law is manifestly founded on the principle of self-preservation. *Nam adversus periculum naturalis ratio permittit se defendere. Digest, Lib. 9. Tit. 2. l. 4.*

(h) When done in defense of life or chastity; because, when lost, they are irreparable. See *Selden: de jur. natur. Lib. IV. cap. 3. Maimon. More Nevochim, Pars III. cap. 40.*

(i) Sometimes the execution was by *burning*; as in the case of a priest's daughter, who had played the whore. *Levit. xxi. 9.* Sometimes by *decollation*, which was the usual way for murder. *Selden: de Synedriis, Lib. II. cap. 13. De jur. natur. Lib. IV. cap. 1.*

Senatus Areopagiticus jus dicit de cade, aut vulnere, non casu, sed voluntate inflicto; de incendio item, & malo veneno hominis necandi causa dato.

Thesmothetæ in homicidas animadvertunt.

Si quis hominem sciens morti duit, capital esto.

Qui alium casu fortuito necasset, in annum deportator, donec aliquem è cognatis occisi placarit; revertitor vero peractis sacris, & lustrationibus.

Si quis imprudens in certaminibus alium necasset, aut insidiantem aut ignotum in prælio, aut in uxore, vel matre, vel sorore, vel filia, vel concubinâ, vel eâ, quam in suis liberis habet, deprehensum, cadis ergo nè exulato.

Si quis alium injuste vim inferentem incontinenti necasset, jure casus esto.

Si quis homicidam foro, urbis territorio, publicis certaminibus, & sacris Amphictyonicis abstinentem occiderit, aut mortis causam prebuerit, perinde ac si Atheniensem civem necasset, capital esto, & Ephetæ jus dicunt. So that by this law a man conscious to himself of homicide might, before he was apprehended, undertake a voluntary exile, and during such an exile was privileged from the penalty of homicide. (k)

Homicidas mortè multato in patria occisi terra, & abducento, ut lege cautum est; in eos ne seviunt, nevé pecuniam (l) exigunt.

Before judgment the kindred of the party slain that prosecuted the manslayer might compound the offense, and release the offender, but after judgment once given, neither the judge nor prosecutor could remit it. (m)

Cadis ne postulator unquam is qui homicidam exulantem & redeuntem quo non licet, in jus ad magistratum rapuerit aut detulerit.

C

And

(k) This was the case of *Theoclymenus* in *Homer Odyss.* o. v. 224, 270. 4. v. 117.

(l) The Greek word *πενία* here render'd *pecuniam*, properly signifies a ransom, *Hæm. Iliad.* a. v. 13, 20, 23, 95. for by the antient law of Greece the punishment of homicide was redeemable by the payment of a sum of money to the

relations of the slain, which recompence was term'd *πείρα* or *πένη*. *Homer. Iliad.* 1. v. 628. σ. v. 498.

(m) That this was the meaning of the foregoing law, see *Petit in leges Atticas Lib. VII. tit. 1. p. 509.* See also the oration of *Demosthenes* against *Aristocrates*, wherein most of the Athenian laws relating to homicide are explained.

And eodem libro tit. 5. *si nox furtum faxit, si im aliquis occisit, jure casus esto*, according to the Mosaical law, and from thence transcribed into the Attic laws, and from thence by the Decemviri into the Roman laws of the twelve tables *in totidem verbis*.

Among the Romans the laws concerning homicide differed in some things both from the Jews and Greeks, as appears *Digest. Lib. XLVIII. tit. 2. Ad legem Corneliam de sicariis & veneficiis*.

Qui hominem occiderit punitor non habitâ differentiâ cujus conditionis hominem (n) interemit.

Qui hominis occidendi furtive faciendi causâ cum telo ambulaverit, (o), qui hominem non occidit sed vulneravit ut occidat, ut homicida damnandus, nam si gladium strinxerit & cum eo percusserit, indubitatè occidendi animo admisit, sed si clavi aut cuccuma in rixa, quamvis ferro, percusserit, tamen non occidendi animo, lenienda pœna ejus, qui in rixa casu magis, quam voluntate, homicidium admisit. (p)

But if it were merely by misfortune, it was not punished. (q)

Qui stuprum sibi vel suis per vim inferentem occidit, dimitendus est, (r) sed is, qui uxorem in adulterio deprehensam occidit, humiliore loco positus in exilium perpetuum dandus, in aliqua dignitate positus ad tempus relegandus. (s)

Furem nocturnum qui occiderit, impune feret, si parcere ei sine periculo suo non potuit (t); which law, tho like to that of the Jews and Greeks, the Roman lawyers have construed (u), that
it

(n) l. 1. §. 2.

(o) l. 1. pr. & Cod. eod. tit. Lib. IX. tit. 16. l. 7.

(p) l. 1. §. 3.

(q) l. 1. §. 3. e. g. If a man, who was cutting a tree, should without calling out throw down a great branch of it upon one who was passing by, and kill him, he was to be acquitted, that is to say, he was not to be proceeded against criminally by the *lex Cornelia de sicariis*; for so is the expression in l. 7. *ad hujus legis coercitionem non pertinet*; but still he was liable by the *lex Aquilia* to make a pecuniary satisfaction for the damage. *Instit. Lib. IV. tit. 3. §. 5.* and tho that law mentions only the case of killing a

slave, yet there lay an *utilis actio* in the case of killing a freeman. See *Noodt ad Leg. Aquil. cap. 2.*

(r) l. 1. §. 4.

(s) l. 1. §. 5.

(t) l. 9.

(u) This was not a meer construction of the Roman lawyers, but is expressly provided by the law of the twelve tables, as appears from *Digest. Lib. IX. tit. 6. ad leg. Aquil. l. 4. §. 1. Cic. pro Milone, cap. 3. A. Gell. Lib. XI. cap. 18. Macrobr. saturnal. Lib. 1. cap. 4.* The reason of this distinction between a night-thief and a day-thief, see in *Grot. de jur. bel. ac pac. Lib. II. cap. 1. §. 12.*

it is lawful to kill *furem nocturnum recedentem & fugientem cum rebus, licet se non defendat telo, sed non diurnum, nisi se defendat telo.*

The punishment of homicide, unless it were merely casual, among the Romans was *deportatio in insulas & omnium bonorum ademptio, sed solent hodie capite puniri, nisi honestiore loco positi fuerint, ut pœnam legis sustineant; humiliores enim solent bestiis subjici (x); altiores vero deportantur in insulas. (y)*

Some temperaments they added in other cases of homicide, as banishment for five years (z), deportation, &c. but regularly the punishment of homicide, unless in case of simple misfortune (a), or defense of life, (b) was death, viz. *bestiis subjiciantur.*

Among the Saxons (c) the punishment of homicide was not always, nor for the most part capital; for it might be redeemed by a recompense which went under the name of *Wera* and *Weregild* (d), which was a rate set down upon the head

(x) *Dig. Lib. XLVIII. tit. 19. de pœnis. l. 28. §. 15.*

(y) *Dig. ad leg. Cornel. de sicariis, l. 16.*

(z) *l. 4. §. 1.*

(a) *Cod. eod. tit. l. 1.*

(b) *Cod. eod. tit. l. 2 & 3.*

(c) It seems to have been the general practice of most of the northern nations to commute the punishment of the most heinous crimes for a pecuniary mulct. *Lindenbrogii Codex Leg. Antiq. Lib. IV. cap. 36.* Tacitus speaking of the ancient Germans says, it was customary among them to punish homicide with a certain number of sheep and oxen, out of which the relations of him that was slain received satisfaction. *Tac. de mor. Germ. cap. 21.* from hence probably our Saxon ancestors brought the custom into Britain.

(d) This *Weregild* or *capitis estimatio*, according to the laws of *Ethelbert*, was usually 100 s. *Leg. Ethelbert. l. 21.* tho in some particular cases it was more. *l. 5. 6, 22.* if the slayer escaped, the relations were to pay half the ordinary *Weregild*, *l. 23.*

By the laws of *Ina* the *Weregild* was different according to the rank and de-

gree of the person killed, of a man worth 200 s. was 30 s. of a man worth 600 s. was 80 s. of a man worth 1200 s. was 120 s. *Leg. Inæ, l. 70.* This rule admitted of some exceptions. *l. 34. l. 74.*

By the laws of *Alfred*, the bare attempt on the king's life was punished with death, unless the offender redeemed it by the payment of the king's *weregild*; the same law was in case a slave attempted the life of his lord, unless he redeemed it by paying his lord's *weregild*. *Leg. Alfred. l. 4.* the *weregilds* were of the same value, as under *Ina*. *Leg. Alfred. l. 9. l. 26.*

By the league between *Alfred* and *Guthrum*, *l. 2.* the value of a common person was 200 s. the same by the league between *Edward* and *Guthrum in fine.*

By the laws of *Alfred*, whoever should attempt his lord's life, was to be put to death; and there is no mention made of any ransom. *Leg. Athelstan, l. 4.* but at the end of his laws, and of the *Judicia Civitatis Lundoniæ*, there is a particular account of the *weregilds* of all orders and degrees, from the king to the peasant; for which see *Wilkin's Leg. Anglo-Sax. p. 64. p. 71.*

head of persons of several ranks; and if any of them were kild, the offender was to make good that rate, or *Weregild* or *capitis æstimatio*, to the kindred of the party slain; or, as some think, part to the king, part to the lord of the fee, and part to the relations of the party slain; which if he could not do, he was to suffer death (e). *Vide Spelm. in Gloss. ad verba Wera & Weregild.*

This custom continued long, even to the time of *Hen. 1.* here in *England*, as appears by his laws in *libro rubro*, *sect. 11.* (f) but shortly after grew obsolete, as being too much contradictory to the divine law. (g) *Vide Covarr. Tomo 2. Lib. II. cap. 9. sect. 2.*

But altho the custom of *Weregild* is abrogated here in *England*, and by the laws of this kingdom the punishment of homicide

I

By the laws of *Ethelred*, *l. 5.* the *weregild* of a common person was increased to 25 pounds. By *l. 8. Gul. Conq. apud Wilkins*, *p. 221.* it was twenty Pounds.

By the laws of *Cnute*, whoever should lie in wait for the life of the king, or of his lord, was to suffer death, and forfeit all he had. *Leges Cnuti*, *l. 54.* Whoever committed a public notorious murder, was likewise to suffer death without redemption; for in *l. 61. Cædes publica & domini proditio* are reckoned amongst the *seclera inexpiabilia*; but it should seem that common homicide was redeemable; for in *l. 6.* it is said, *Homicidæ inclinent, vel emendent, vel scienter in peccatis moriantur.*

(c) The *weregild* was usually divided into three parts; the first, which was called *Fritb-bote*, was paid to the king for the loss of his subject; the lord had another for the loss of his man, which was call'd *Man-bote*; and the kindred of the slain for their loss had the third part, which was call'd *Mag-bote*. See *Spelm. life of Alfred*, *Book II. c. 11.* in the case of killing the king, besides the *weregild*, which was to be paid to the king's relations, there was also another payment call'd *cynelot* or *cynegild*, to be made to the publick for the loss of their king.

(f) And *c. 12.* see *Wilkin's leges Anglo Sax.* *p. 244.* But it appears from

the same laws *l. 71. ibid. p. 267.* that a malicious murder, by poison or the like, was *factum mortiferum nullo modo redimendum*: The genuineness of these laws is justly questioned, for that they not only are in the nature of commentaries rather than laws; but also in *l. 5. Gregory's* decretals are cited, which were not compiled till fifteen years after the death of *Henry I.* however, they are allow'd to be very antient, and to contain the usages of the *Anglo-Saxons*. See *Hickesii Dissert. Epist. p. 96.*

(g) It cannot but seem strange to us at this time of day, that the wilful murder of any one, much more of the king, should be punished only with a pecuniary mulct; to solve this difficulty, *Mr. Rapin* supposes that this commutation was allow'd only in the case of simple homicide; or at most what is now known by the name of manslaughter, but not in the case of a premeditated murder: See *Rapin's Histoire d'Angleterre*, *Vol. I. p. 520.* This notion is in it self reasonable, and seems to be favoured by *l. 4. of Athelstan*, and *l. 54. of Cnute*, which make it capital barely *insidiari regi vel domino*, much more to take away the life of the king or his lord; but on the other hand it seems somewhat hard to suppose that among so many laws against homicide, they should all be level'd against casual or sudden killing only, and scarce any against wilful murder.

micide is regularly death (*b*), as shall hereafter be shewn; yet since there are in *England* two kinds of proceedings in punishing of homicide, the one at the suit of the heir or wife by appeal, the other at the suit of the king by indictment, the capital punishment of the offender may be discharged by all parties interested, namely by the appellant by release, and by the king by his pardon.

And thus far touching the punishment of homicide.

Now I shall consider somewhat also of the punishment of *theft*, and the various laws and usages concerning the same in several kingdoms and states, and at different times in the same state or kingdom.

By the *Jewish* law, *Exod.* xxii. 1, 4. *If a man steal an ox or a sheep, and sell or kill it, he shall restore five oxen for an ox, and four sheep for a sheep: If the theft be found in his hands alive, whether ox, ass or sheep, he shall restore double; and the like for other goods (i);* so that there was no capital punishment in case of theft, tho it were accompanied with *burglary*, as breaking a house, (but men-stealers were punished with death (*k*); but it seems by the civil constitutions of that state the punishment thereof was sometimes enhanced, at least in some circumstances, sometimes to a seven-fold restitution, *Prov.* vi. 31. and also to death. *2 Sam.* xii. 5. (*l*)

Now as to the *Attic* laws: *Samuel Petit de Legibus Atticis, Lib. VII. tit. 5.* gives us an account of their laws concerning theft, in some things differing, in some things agreeing with the *Jewish* laws, *furem cujusunque modi furti supplicio capitis*
D
punitor.

(*b*) The offender is to be hanged by the neck till he be dead; and in case he was convicted on an appeal, the ancient usage was, that all the relations of the slain should drag him with a long rope to the place of execution. *3 Co. Inst.* 131. *Plowd.* 306. *b.* *11 Hen.* 4. 12. *a.*

(*i*) *Exod.* xxii. 7, 9. The reason why the restitution of an ox was more than of a sheep is supposed by *Maimonides more Nevochim Par. III. cap. 41.* to be, because sheep are more easily guarded against thieves than oxen, who feed at a greater distance one from another.

(*k*) *Exod.* xxi. 16.

(*l*) This passage from the book of *Samuel* does by no means prove what it is brought for, *viz.* that theft was punishable with death by the *Jewish* law; for the case there put of taking away a poor man's lamb, was attended with violence and other aggravating circumstances, which provok'd king *David* to say, *The man that hath done this shall surely die; and some render the words, Does deserve to die;* but at most it only proves the vehemence of *David's* anger at the man, and not what was the law of the *Israelites*.

punito. This was *Draco's* law; but it was thought too severe, and therefore *Solon* corrected it (*m*), *Si furtum factum sit, & quod furto perierat receperit dominus, duplione luito furtum qui fecit & quorum ope consilioque fecit; decuplione vindicator, ni dominus rem furtivam receperit, in nervo quoque habetor dies ipsos quinque totidemque noctes, si heliastæ pronunciârint; pronunciando autem, cum de pœna illius agitur.*

Si lucri furtum cujus æstimatio sit supra 50 drachmas faxit, ad undecim viros rapitor; si nox furtum faxit, si in aliquis occisit, jure cæsus esto:—Manifestum hujusmodi furtum qui faxit, etiamsi vades dederit, non noxæ factæ sarcitione, sed morte luito. Si quis item ex aliquo gymnasio vestis aut lecythi aut alicujus vel minimæ rei, aut supellectilis e gymnasio, aut ex balneo, aut è portubus, quod excedat 10 drachmarum æstimationem, furtum faxit, morte luito.

Manifesti sacularii (n) morte luunto.

Vecticularii (o) manifesti morte luunto.

Plagiarii (p) manifesti morte luunto.

In hortos irrumpere ficosque deligere capital esto (q): So that the quantity of the thing stolen, the place, the season, the manner, and other circumstances heightened theft into a capital punishment, that otherwise by *Solon's* laws was only pecuniary and imprisonment. (*r*)

2

Now

(*m*) See *A. Gellium, Lib. XI. cap. 18.* & *Plutarch. in Vitâ Solonis.*

(*n*) Βαλαντιοποιῶν, A cut-purse.

(*o*) Τοιχαροχῶν, A house-breaker.

(*p*) Ἀιδραποδοσόμενοι, Sive Plagiarius, is est, qui sine vi, dolo malo, sciens abducit homines liberos & ingenuos, venditque pro servis, aut supprimit: vel is est, qui alienos servos abducit sine vi, & plerumque sine furto, & fugam persuadet, aut fugitivos celat. Petit. Comment. ad Lib. VII. tit. 5. de furtis.

(*q*) But this was a temporary law, made in a time of dearth, when it was thought necessary to prohibit the exportation of Figs. However, prosecutions of offenders against this law soon grew odious; from hence all malicious informers were called *Sycophants*. Vide *Athenæi Deipnosophist. Lib. III. & Scho-*

liast. in Aristophanis Plutum ad v. 31. & 874.

(*r*) Among the *Lacedæmonians* all manner of theft was permitted, as a practice, which tended to instruct their youth in the stratagems of war. *A. Gel. Lib. XI. cap. 18.* It was also unpunished among the antient *Egyptians*. *A. Gel. ubi supra.* But we learn from *Diodor. Sic. Lib. I.* that it was allow'd only on certain conditions, for it was provided by a law, that whoever was minded to follow the trade of thieving, should first enter his name with the captain of the gang, and should bring in all his booty to him, that so the right owner might know where to apply for the recovery of his goods, which were restored to him on paying the quarter of the value.

Now as to the Roman laws: For a theft, that was not *furtum manifestum*, there is given *actio in duplum*; but if it were *furtum manifestum*, *actio in quadruplum* (f); *furtum autem manifestum est, cum fur deprehenditur in furto.* (t)

But now as to punishments among the Romans, there were these degrees or orders: I. Capital punishments, (*viz. ultimum supplicium*) (u) which were 1. *Damnatio ad furcam.* 2. *Vivi crematio.* 3. *Capitis amputatio.* 4. *Damnatio ad feras.* II. Others, that were in the next degree, were 1. *Coercitio ad metalla.* 2. *Deportatio ad insulas.* III. Others again of a lower allay were 1. *Relegatio ad tempus vel in perpetuum.* 2. *Datio in publicum opus.* 3. *Fustigatio.* (x)

I find not among the Romans any greater punishment of theft, than four-fold restitution (y), unless in these cases:

1. *Si quis ex metallo principis vel ex monetâ sacrâ furatus est, pœna metalli & exilii punitor.* (z)

2. *Grassatores qui cum ferro aggredi & spoliare instituunt, capite puniuntor.* (a)

3. *Famosi latrones ad bestias vel furcas damnantor. Digest. de pœnis.* (b)

If we come to the laws and customs of our own kingdom, we shall find the punishment of theft in several ages to vary according as the offense grew and prevailed more or less. (c)

Among

(f) *Inst. Lib. IV. tit. 5. §. 5. Digest. Lib. XLVII. tit. 2. de furtis, l. 46. §. 2.* herein the Roman law greatly resembled the Jewish, with this difference, that by the Jewish law the punishment of four-fold was to be instead of restitution; whereas by the Roman law the thing stolen was recoverable over and above the *pœna quadrupli.* *Dig. eod. tit. l. 54. §. 3.*

(t) *Dig. cod. tit. l. 2. l. 3. pr.* By this was meant not only if he was taken in the Fact, but also if he was apprehended with the goods upon him before he had carried them to the place, where they were to remain that night, and answers to the expression in our law of being taken in the *mainourre.*

(u) *Dig. Lib. XLVIII. tit. 19. de pœnis, l. 21.*

(x) *Dig. cod. tit. l. 28. pr. §. 1. l. 11. §. 3.*

(y) So far were the Romans from inflicting capital punishments for theft, that on the contrary it was expressly forbidden by Justinian, that any person should be put to death, or suffer the loss of member for theft. *Novel CXXXIV. cap. ult.*

(z) *Dig. Lib. XLVIII. tit. 13. ad leg. Jul. pœculatûs, l. 6. §. 2. Lib. XLVIII. tit. 19. de pœnis, l. 38.*

(a) *Dig. cod. tit. l. 28. §. 10.*

(b) *Dig. cod. tit. l. 28. §. 15.*

(c) By the laws of Ethelbert, if one man stole any thing from another, he was to restore three-fold besides a fine to the king, l. 9. if he stole any thing from the king, he was to restore nine-fold, l. 4.

Among the laws of king *Athelstan*, mentioned by *Brampton*, p. 849, 852, 854. *Non parcatur alicui latroni supra 12 annos & supra 12 d. quin occidatur (d)*, Edmund his successor*, *præcepit nè infra 15 annos, vel pro latrocinio infra 12 d. occidatur, nisi fugerit, vel se defenderit*: *Malmsbury* tells us, that in the time of *William I.* theft was punished with castration, and loss of eyes(e); but in the time of *Henry I.* the antient law, which continues to this day, was *ut siquis in furto vel latrocinio deprehensus fuerit, suspenderetur. (f)*

And altho many of the schoolmen and canonists are of opinion that death ought not to be inflicted for theft (g), yet

By the laws of *Ina* a thief was punished with death, unless he redeemed his life *capitis æstimatione*, l. 12. which was 60 s. l. 7. but if a villain, who had been often accused, should be taken in a theft, he was to have an hand or foot cut off, l. 18.

By the laws of *Alfred* whoever stole a mare with the foal, or a cow with the calf, was to pay 40 s. besides the price of the mare or cow, l. 16. Whoever stole any thing out of a church, was to pay the value, and a fine according to the value; and also was to have that hand cut off, which committed the fact, l. 6. If any person committed a theft *die Dominico*, or any other great festival, he was to pay double, l. 5.

(d) By the first law of *Athelstan* it was but 8 d. *Wilkins leges Anglo-Sax. p. 56.* but afterwards by the laws of the same king enacted at *London*, and thence cald *judicia civitatis Landoniæ*, no one was to be put to death for a theft under 12 d. *Ibid. p. 65.* But in case the thief fled or made resistance, then he might be put to death, tho it were under that value. *Ibid. p. 70.* By the law of *Cnut* theft was punished with death. *Ibid. p. 134. l. 4. and p. 143. l. 61.*

(*) This is a mistake, for no such law is found among the laws of that king, but it is among the later laws of king *Athelstan*. *Vide Judicia Civ. Lond. Wilk. leg. Anglo-Sax. p. 70.*

(e) By the laws of *William I.* it was expressly prohibited, that any should be hanged or put to death for any offense, but that his eyes should be pluck out, his testicles, hands or feet cut off, accord-

ing to the degree of his crime, l. 67. *apud Wilkins leg. Anglo-Sax. p. 229. p. 218.*

(f) In former times, tho the punishment of theft was capital, yet the criminal was permitted to redeem his life by a pecuniary ransom; but in the 9th Year of *Henry I.* it was enacted, that whoever was convicted of theft (or any other felony. 3 *Co. Instit. 53.*) should be hanged, and the liberty of redemption was entirely taken away. *Wilk. leg. Anglo-Sax. p. 504.* This law still remains at this day; but considering the alteration in the value of money, the severity of it is much greater now than then, for 12 d. would then purchase as much as 40 s. will now; and yet a theft above the value of 12 d. is still liable to the same punishment, upon which Sir *Hen. Spelman* justly observes, that while all things else have rose in their value and grown dearer, the life of man is become much cheaper. *Spelm. in verbo latrocinium*; from hence that learned author takes occasion to wish, that the antient tenderness of life were again restored, *Iustum certè est, ut collapsa legis æquitas restauretur, & ut divinæ imaginis vehiculum, quod superiores pridem ætates ob gravissima crimina nequaquam tollerent, levioribus hodie ex delictis non perderetur.*

(g) *Scotus Sentent. 4. distinct. 154. quæst. 3. Sylvester in verbo furtum 3.* Not only the schoolmen and canonists were of this opinion, but by what has been above said it appears likewise to have been the sense both of the *Jewish* and *Roman* laws; and tho, as our author says, the prin-

yet the necessity of the peace and well ordering of the kingdom hath in all ages and almost all countries prevailed against that opinion, and annexed death as the punishment of theft, when the offense hath grown very common and accompanied with enormous circumstances, tho in some places more is left herein to the *Arbitrium Judicis* to give the same or a more gentle sentence according to the quality of the offense and offender, than is used in *England*, where the laws are more determinate, and leave as little as may be to the *Arbitrium Judicis*. See the case disputed learnedly by *Covarruvias Tomo 2. Lib. II. cap. 9. §. 7.*

This I have therefore mentioned, that it may appear, that capital punishments are variously appointed for several offenses in all kingdoms and states, and there is a necessity it should be so, for regularly the true, or at least, the principal end of punishments is to deter men from the breach of laws, so that they may not offend, and so not suffer at all, and the inflicting of punishments in most cases is more for example and to prevent evils, than to punish. When offenses grow enormous, frequent and dangerous to a kingdom or state, destructive or highly pernicious to civil societies, and to the great insecurity and danger of the kingdom and its inhabitants, severe punishments, even death it self, is necessary to be annexed to laws in many cases by the prudence of law-givers, tho possibly beyond the single demerit of the offense it self simply consider'd.

Penalties therefore regularly seem to be *juris positivi*, & *non naturalis*, as to their degrees and applications, and therefore in different ages and states have been set higher or lower according to the exigence of the state and wisdom of the law-giver. Only in the case of *murder* there seems to be a justice of retaliation, if not *ex lege naturali*, yet at least by a general divine law given to all mankind, *Gen. ix. 6.* and altho I do not deny but the supreme king of the world may

E

remit

principal end of punishment is to deter men from offending, yet it will not follow from thence, that it is lawful to deter them at any rate, and by any means; for even obedience to just laws may be enforced by unlawful methods. *Cic. Epist. 25. ad Brutum. Est pænæ modus, sicut*

rerum reliquarum; and again Lib. I. de officiis, Est enim ulciscendi & puniendi modus. Besides experience might teach us, that capital punishments do not always best answer that end. See *Grot. de jur. bel. &c. Lib. II. cap. 20. §. 12. u. 3.*

remit the severity of the punishment, as he did to *Cain*, yea and his substitutes sovereign princes may also defer or remit that punishment, or make a commutation of it upon great and weighty circumstances, yet such instances ought to be very rare, and upon great occasions.

In other cases the *lex talionis* in point of punishments seems to be purely *juris positivi*; and altho among the *Jewish* laws we find it instituted *Exod. xxi. 24, 25. Eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe*; yet in as much as the party injur'd is living and capable of another satisfaction of his damage, (which he is not in case of murder) I have heard men greatly read in the *Jewish* lawyers and laws affirm, that these *taliones* among the *Jews* were converted into pecuniary rates and estimates to the party injured, so that in penal proceedings the rate or estimate of the loss of an eye, tooth, hand or foot was allowed to the person injur'd, *viz.* the price of an eye for an eye, and the price of an hand for an hand, &c. (b)

- (b) *Maimonides More Nevochim, Pars III. cap. 41.*

C H A P. II.

Concerning the several incapacities of persons, and their exemptions from penalties by reason thereof.

MAN is naturally endowed with these two great faculties, understanding and liberty of will, and therefore is a subject properly capable of a law properly so called, and consequently obnoxious to guilt and punishment for the violation of that law, which in respect of these two great faculties he hath a capacity to obey: The consent of the will

is that, which renders human actions either commendable or culpable; as where there is no law, there is no transgression, so regularly, where there is no will to commit an offense, there can be no transgression, or just reason to incur the penalty or sanction of that law instituted for the punishment of crimes or offenses. And because the liberty or choice of the will presupposeth an act of the understanding to know the thing or action chosen by the will, it follows that, where there is a total defect of the understanding, there is no free act of the will in the choice of things or actions. But general notions or rules are too extravagant and undeterminate, and cannot be safely in their latitude applied to all civil actions; and therefore it hath been always the wisdom of states and law-givers to prescribe limits and bounds to these general notions, and to define what persons and actions are exempt from the severity of the general punishments of penal laws in respect of their incapacity or defect of will.

Those incapacities, or defects, that the laws, especially the laws of *England*, take notice of to this purpose, are of three kinds :

- I. Natural.
- II. Accidental.
- III. Civil incapacities or defects.

The natural is that of *Infancy*.

The accidental defects are,

1. *Dementia*.
2. *Casualty, or Chance*.
3. *Ignorance*.

The civil defects are,

1. *Civil Subjection*.
2. *Compulsion*.
3. *Necessity*.
4. *Fear*.

Ordinarily none of these do excuse those persons, that are under them, from civil actions to have a pecuniary recompense

pense for injuries done, as *trespasses, batteries, woundings*; because such a recompense is not by way of penalty, but a satisfaction for damage done to the party: but in cases of crimes and misdemeanors, where the proceedings against them is *ad pœnam*, the law in some cases, and under certain temperaments takes notice of these defects, and in respect of them relaxeth or abateth the severity of their punishments.

C H A P. III.

Touching the defect of infancy and nonage.

THE laws of *England* have no dependence upon the civil law, nor are governed by it, but are binding by their own authority; yet it must be confessed, the civil laws are very wise and well composed laws, and such as have been found out and settled by wise princes and law-givers, and obtain much in many other kingdoms so far as they are not altered abrogated or corrected by the special laws or customs of those kingdoms, and therefore may be of great use to be known, tho they are not to be made the rules of our *English* laws; and therefore tho I shall in some places of this book, and here particularly, mention them, yet neither I, nor any else may lay any weight or stress upon them, either for discovery or exposition of the laws of *England*, farther than by the customs of *England* or Acts of Parliament they are here admitted.

As to this business touching infancy, and how far they are capable of the guilt or punishment for crimes: I will consider, 1. What the civil laws tell us concerning the same. 2. What the common laws of *England* have ordained touching it, and wherein these agree, and wherein they differ touching this matter.

The Civil law distinguisheth the ages into several periods as to several purposes.

First, The complete full age as to matters of contract is according to their law twenty-five years (a), but according to the law of *England* twenty-one years. (b)

Secondly, But yet before that age, viz. at seventeen years; a man is said to be of full age to be a procurator (c), or an executor (d); and with that also our law agrees. 5 *Co. Rep. Pigot's case.* (e)

Thirdly, As to matrimonial contracts the full age of consent in males is fourteen years, and of females twelve (f); till that age they are said to be *impuberes* (g), and are not bound by matrimonial contracts; and with this also our law agrees. (h)

Fourthly, As to matter of crimes and criminal punishments, especially that of death, they distinguish the ages into these four ranks.

1. *Ætas pubertatis plena.*
2. *Ætas pubertatis.*
3. *Ætas pubertati proxima.*
4. *Infantia.*

1. *Pubertas plena* is eighteen years. (i)

2. *Puber-*

(a) *Institut. Lib. I. tit. 23. De Curatoribus. Dig. Lib. IV. tit. 4. de Minoribus, l. 1. &c.*

(b) *Lit. §. 104. Co. Lit. §. 103.*

(c) *Institut. Lib. I. tit. 6. Quibus ex causis manumittere non licet, §. 5 & 7. Dig. Lib. III. tit. 1. De Postulando, l. 1. §. 3.* At this age it was the custom among the Romans to lay aside the habits of children, and put on the garments of men. *Val. Max. Lib. V. cap. 4. §. 4. Sueton. August. cap. 8.*

(d) See *Swinb. of wills, par. V. §. 1. n. 6.*

(e) It is quoted in *Prince's case, 5 Co. Rep. 29. b. Office of Executors, p. 307.*

(f) *Instit. Lib. I. tit. 10. de nuptiis pr. Dig. Lib. XXIII. tit. 2. de ritu nuptiarum, l. 4.*

(g) *Institut. Lib. I. tit. 22. Quibus modis tutela finitur. pr. Dig. Lib. XXVIII.*

tit. 6. de vulg. & pupil. substitut. l. 2. Macrob. Saturn. Lib. VII. cap. 7.

(h) *Co. Lit. §. 104.* At the same age they were permitted by the civil law to make a testament. *Digest. Lib. XXVIII. tit. 1. Qui testamenta facere possunt, l. 5. Institut. Lib. II. tit. 12. Quibus non est permittum facere testamentum, §. 1. Cod. Lib. VI. tit. 22. Qui testamenta facere possunt, vel non, l. 4.* The common law seems not to have determined precisely at what age one may make a testament of a personal estate, it is generally allowed that it may be made at the age of eighteen. *Office of Executors, p. 305. Co. Lit. 89. b.* and some say under, for the common law will not prohibit the spiritual court in such cases. *Sir Tho. Jones, Rep. 210. 1 Vern. 255. 2 Vern. 469.*

(i) *Dig. Lib. I. tit. 7. de adoption. l. 40. §. 1. Instit. cod. tit. §. 4. Dig. Lib.*

2. *Pubertas* generally, in relation to crimes and punishments is the age of fourteen years and not before (*k*); and it seems, as to this purpose there is no difference between the male and female sex; at this age they are supposed to be *doli capaces*, and therefore for crimes, altho capital, committed after this age they shall suffer as persons of full age (*l*), only by the constitutions of some kingdoms, in favour of their age, the ordinary punishments were not inflicted upon such young offenders; as in *Spain*, not unless he were of the age of seventeen years. *Vide Covar. de Matrimonio, cap. 5. §. 8. (m) In Relectione ad Clement. cap. Si furiosus (n)*. By the antient law among the *Jews*, he that was but a day above thirteen years, was as to criminals adjudged *in virili statu*, but not if under that age. (†)

3. *Ætas pubertati proxima*, herein there is great difference among the *Roman* lawyers; and tho they make a disparity herein between males and females, yet I think as to point of crimes the measure is the same for both: Some assign this *Ætas pubertati proxima* to ten years and an half; others to eleven years (*o*): If they be under the age, which they call *Ætas pubertati proxima*, they are presumed *incapaces doli (p)*, and therefore regularly not liable to a capital punishment for a capital offense; but this holds not always true, for according to the opinion of very learned civilians before ten years and a half they may be *doli capaces*, and therefore it must be left *ad arbitrium judicis* upon the circumstances of the case, yet with this caution, *Judex, qui ante illam ætatem arbitrari debet puerum esse proximum pubertati, maximis adducendus est conjecturis, & cautissime id aget, ac tandem raro. Covarr. ubi supra (q)*. And with this agrees our law, as shall be shewed.

XLII. tit. 1. de re judicat. l. 57. Lib. XXXIV. tit. 1. De alimentis, l. 14. §. 1.

(k) Dig. Lib. XXIX. tit. 5. de Senatusconsulto Siliano, &c. l. 1. §. 32.

(l) Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. 1. Lib. XLVIII. tit. 5. ad leg. Jul. de adult. l. 36. Cod. Lib. 2. tit. 35. Si adversus delictum, l. 1.

(m) Tom. I. p. 157.

(n) Par. III §. 5. Tom. I. p. 558.

(†) Seld. de Synodriis, Lib. II. cap. 13. §. 132.

(o) The prevailing opinion is that the males are *pubertati proximi* at ten and an half, and the females at nine and an half, because when they had pass'd the middle distance between infancy and puberty, they might then be properly said to be *ætatis pubertati proxime*.

(p) Dig. Lib. XLVII. tit. 12. de sepulchro violato. l. 3. §. 1.

(q) Tom. I. p. 157.

shewed. But if the offender be *in ætate pubertati proximâ*, viz. according to some, ten years and an half, according to others eleven years old, he is more easily presumed to be *doli capax*, and therefore may suffer as another man, unless by great circumstances it appear, that he is *incapax doli*. But this hath also its temperaments, 1. By express provision of the constitution *in Codice De falsi Monetâ*: “*Impuberes, si conscii fuerint, nullum sustineant detrimentum, quia ætas eorum, quid videat, ignorat*”; but a penalty is laid upon the tutor. (r)

2. Tho *ætate pubertati proxima* is regularly presumed *capax doli*, and so may be guilty of a capital offense. *Digest. De regulis juris (f)*. *Pupillum, qui proximus est pubertati, capacem esse furandi*, yet as it is *in arbitrio judicis* to judge an infant within ten years and an half *capax doli*, as before; so it is *in arbitrio judicis* upon consideration of circumstance to judge one above ten years and a half, nay of twelve, thirteen years, or but a day within fourteen years, to be *incapax doli*, and so privileged from punishment, as appearing upon the circumstances of the fact not yet *constitutus in ætate proximâ pubertati*, or at least not *doli capax*; and with this our law doth in a great measure agree.

3. That if he be above ten years and a half, and appears *doli capax*, yet if under fourteen years, he is not to be punished *pœnâ ordinariâ*, but it may have some relaxation *ex arbitrio judicis*. (t) But altho our law indulges a power to the judge to reprieve before or after judgment an infant convict of a capital offense in order to the king's pardon, yet it allows no arbitrary power to the judge to change the punishment that the law inflicts; and thus far for the third age or period, *Ætas pubertati proxima*.

4. The fourth age or period is *infantia*, which lasts till seven years; within this age there can be no guilt of a capital offense; the infant may be chastized by his parents or tutors, but cannot be capitally punished, because he cannot be guilty (u);

(r) *Lib. IX. tit. 24. l. 1.*

(f) *Lib. L. tit. 17. l. 111. Lib. XXIX. tit. 5. de Senatusconsulto Siliano, l. 14. Lib. XLIV. tit. 4. de doli mali exceptione, l. 4. §. 26. Instit. Lib. IV. tit. 1.*

de obligat. quæ ex delicto, §. 18. Dig. Lib. XLVII. tit. 2. de furtis, l. 23.

(t) *Dig. Lib. IV. tit. 4. de minoribus, l. 37. §. In delictis.*

ty (*u*); and if indicted for such an offense as is in its nature capital, he must be acquitted; and therefore the severity of the gloss upon the decretal *De delictis puerorum, cap. 1. (x)* is justly rejected in this case (*y*), and with this agrees the law of England.

But now let us consider the laws of England more particularly touching the privilege of infancy in relation to crimes and their punishments, and that in relation to two kinds of crimes, 1. such as are not capital, 2. such as are capital.

First, As to misdemeanors and offenses that are not capital: in some cases an infant is privileged by his nonage, and herein the privilege is all one, whether he be above the age of fourteen years or under, if he be under one and twenty years; but yet with these differences:

If an infant under the age of twenty-one years be indicted of any misdemeanor, as a riot or battery, he shall not be privileged barely by reason that he is under twenty-one years, but if he be convicted thereof by due trial, he shall be fined and imprisoned; and the reason is, because upon his trial the court *ex officio* ought to consider and examine the circumstances of the fact, whether he was *doli capax*, and had discretion to do the act wherewith he is charged; and the same law is of a *feme covert*. 2. But if the offense charged by the indictment be a mere non-feasance, (unless it be of such a thing as he is bound to by reason of tenure, or the like, as to repair a bridge, &c.) (*z*) there in some cases he shall be privileged by his nonage, if under twenty-one, tho above fourteen years, because *Laches* in such a case shall not be imputed to him (*a*).

36 E. 3. *Affis.* 443. 4 H. 7. 11. *b*. If an infant in *Affise* vouch a record, and fail at the day, he shall not be imprisoned (*b*), nor it seems a *feme covert*. 13 *Affis.* 1. (*c*) and yet the statute of *Westminst.* 2. *cap.* 25. that gives imprisonment, in such a case, is general.

2

8 E. 2.

(*u*) *Dig. Lib. XLVII. tit. 2. de fur-*
tis, l. 23. Lib. XLVIII. tit. 8. ad leg.
Cornel. de sicariis, l. 12.

(*x*) *Decretal. Lib. V. tit. 23.*

(*y*) *Tom. 1. p. 157.*

(*z*) 2 *Co. Inst.* 703.

(*a*) *B. Saver default, 50. Cro. Jac.*
465, 466. *Pl. Com.* 364. *a. Co. Lit.* 246. *b.*

(*b*) 2 *Co. Instit.* 414.

(*c*) *B. Coverture* 35. *Resceit* 87.

8 E. 2. Coronæ 395. If *A.* kills *B.* and *C.* & *D.* are present, and do not attach (*d*) the offender, they shall be fined or imprisoned; yet if *C.* were within the age of twenty-one years, he shall not be fined nor imprisoned.

3. Where the corporal punishment is but collateral, and not the direct intention of the proceeding against the infant for his misdemeanor, there in many cases the infant under the age of twenty-one shall be spared, tho possibly the punishment be enacted by parliament. 14 Aff. 17. (*e*) If an infant of the age of eighteen years be convict of a disseisin with force, yet he shall not be imprisoned. Vide 26 Aff. 9. 43 E. 3. Imprisonment 16. 40 E. 3. 44. a. (*f*), and yet a feme covert shall be imprisoned in such case. 16 Aff. 7.

If an infant be convict in an action of trespass *vi & armis*, the entry must be *nihil de fine, sed pardonatur, quia infans*; for if a *capiatur* be entred against him, it is error, for it appears judicially to the court, that he was within age, when he appears by guardian. P. 8 Fac. B. R. *Holbrooke v. Dogley, Croke n. 3.* (*g*); the like law is that he shall not be *in misericordia pro falso clamore.* (*h*)

B. Coverture 68. General statutes that give corporal punishment are not to extend to infants, and therefore Pl. Com. 364. a. per *Walsh*, if an infant be convict in ravishment of ward, he shall not be imprisoned, tho the statute of *Merton, cap. 6.* be general in that case (*i*): but this must be understood where it is, as before said, a punishment as it were collateral to the offense, as in the cases before mentioned: but where a fact is made felony or treason, it extends as well to

G infants

(*d*) The words of the book are *ne leve le main d'attach.*

(*e*) F. Imprisonment 8.

(*f*) "Et le cause est, pur ceo que la ley entend', que un enfant ne poit my conultr' bien & mal', ne le quel soit advantage pur luy, ou nemy; ne nul folly serra adjudge en un enfant." Mes 12 H. 4. 22. b. *Hank* dit, que enfant d'age de 18 ans poit estre disseisor ove-force & estre emprison per cella.

(*g*) Cro. Fac. 274.

(*h*) Co. Lit. 127. a. yet this was not a settled point, for 2 E. 3. 5. the court

doubted of it; and in 17 E. 3. 75. b. and 41 Aff. 14. the plaintiffs, tho infants, were amerced *pro falso clamore*; but tho they were amerced, yet it appears from the same cases, that they were intitled on account of their infancy to a pardon of course. See 1 R. A. 214.

(*i*) Another like case is there put, if an infant be a receiver and account before auditors, and be found in arrears, the auditors cannot commit him to prison notwithstanding the general words of the statute of *W. 2. cap. 11.*

infants, if above fourteen years (k), as to others, as shall be said. And this appears by several acts of parliament, and particularly by 1 Jac. cap. 11. of felony for marrying two wives, &c. where there is a special exception of marriages within the age of consent, which in females is twelve, in males fourteen years; so that if the marriage were above the age of consent, tho within the age of twenty-one years, it is not exempted from the penalty.

So by the statute of 21 H. 8. cap. 7. concerning felony by servants that imbezil their masters goods delivered to them, there is a special proviso, that it shall not extend to servants under the age of eighteen years, who certainly had been within the penalty, if above the age of discretion, viz. fourteen years, tho under eighteen years, unless a special provision had been to exclude them (l).

I come therefore to consider the privilege of infancy in cases of capital offenses and punishments according to the laws of England, wherein I shall examine, 1. How the antient law stood. 2. How it stands at this day in relation to infants.

I. As to the antient law:

1. By what has been before said it appears the Civil law was very uncertain in defining what was that *etas pubertati proxima*, and consequently such as might subject the offender to capital guilt or punishment; some taking it to be ten years and an half, some eleven years, others more, others less. The laws of England therefore, that always affect certainty, determined antiently the *etas pubertati proxima* to be twelve years for both sexes; under that age none could be regularly guilty of a capital offense, and above that age and under fourteen years, he might or might not be guilty according to the circumstances of the fact that might induce the court and jury to judge him *doli capax, vel incapax* (m).

2

This

(k) Co. Lit. 247. b.

(l) The like exception there is in the 12 Ann. cap. 7. where apprentices under the age of fifteen years, who shall rob their masters, are excepted out of the act.

(m) By the laws of *Ina*, l. 7. an infant of ten years of age might be guilty of being accessory to a theft, and was punished accordingly with servitude. *Wilk. leg. Anglo-Sax.* p. 16.

This appears by the laws of king *Athelstan* mentioned in the first chapter, “*Non parcatur alicui latroni super 12 annos & supra 12 d. quin occidatur.*” And altho his successor *Edmund* (n) reduced it to fifteen years, unless he fled, yet it will appear that the standard of twelve years obtained in after-ages (o).

2. It appears that an infant of twelve years was compellible to take the oath of alligance in the leet, and under that age none were to take the oath, or to do fuit to the leet. *Braët. Lib. III. (p) cap. 1. (q) Britton, cap. 29. in fine, Calvin’s case, 7 Co. Rep. 6. b.* So that at that age, and not before, he was taken notice of by the law to be under the obligation of an oath, and consequently capable of discretion.

3. The ordinary process against capital offenders was and is by *Capias* and *Exigent*, and *Utlary* thereupon; but against an infant under twelve process of utlary in cases of indictment was not awardable, and if awarded, it was error; but if above that age, that process was awardable; and *Braët. Lib. III. (r) cap. 11. sect. 4 & 5.* gives the reason, “*Minor vero, qui infra etatem 12 annorum fuerit, utlegari non debet, quia ante talem etatem non est sub lege aliqui nec in decenna*”; and *ibidem cap. 10. sect. 1.* he mentions an old law of king *Edward* (s), “*Omnis, qui etatis 12 annorum fuerit, facere de-*
“ *bet*

(n) This is a mistake, for it was not *Edmund* but king *Athelstan* himself, who thinking it a pitiable case that a youth but twelve years old should be put to death, as was permitted by the former law, changed the time from twelve years to fifteen, and ordered that none who was but fifteen years of age should be put to death, unless he resisted or fled; if he surrendered himself, he was only to be imprisoned until some of his relations or friends would become security for him *juxta plenam capitis estimationem, ut semper ab omni malo abstineat*, if he could not get any such security, then he was to take an oath to the same purpose in such manner as the bishop should direct him, and was to remain in servitude pro capitis sui estimatione; but if after this he should be again guilty, then he was to be put to death without

any regard to his age. See *Wilk. leges Anglo-Sax. p. 70.*

(o) In the time of king *Henry I.* the old law of king *Athelstan* took place, *viz.* twelve years of age, and 8d. value. *Ibid. p. 259.*

(p) *De Corona.*

(q) This seems to be a mistake, for *cap. 11. sect. 4.* for the oath mentioned in *cap. 1.* was to be taken by knights and others of the age of fifteen years and upwards.

(r) *De Corona.*

(s) There is no such law extant among those of king *Edward*, but the law here quoted is a law of *Cnut*, *Leg. Cnuti, l. 19.* which is in these words, *Volumus ut quilibet homo 12 annos natus jusjurandum præstet se nolle furem esse neque furi consentaneum*, which oath is to the same purpose with that mentioned by

by

“bet sacramentum in visu franciplegii, quod nec latro vult esse, nec latroni consentire”; and *Stamf. Lib. I. cap. 19.* cites out of a book of *Bracton, De Visu Franci plegii*, “*Quod quilibet duodecim annorum potest feloniam iudicium sustinere*”, which implies also that within that age, regularly at least, he could not be a felon.

4. Again, *T. 32. E. 1. Rot. 32. Eboracum, coram rege.* “*Adam filius Ade de Arnhale captus noctanter in domo Johannis Somere coram rege ductus cognovit, quod furtive cepit, &c. 9 s. per præceptum & missionem Richardi Short:*” Richard Short had his clergy, “*Et prædictus Adam commissus fuit custodie mariscalli custodiend’, quia infra ætatem; postea habito respectu ad imprisonamentum, quod prædictus Adam habuit, & etiam ad teneram ætatem ejusdem Ade, eo quod non est nisi ætatis 12 annorum, qui talis ætatis iudicium ferre non potest, ideo de gratiâ regis deliberetur, &c.*” Upon this record these things are observable, *viz.* 1. The court recorded his confession; but regularly that ought not to be, for if an infant under the age of twenty-one shall confess an indictment, the court in justice ought not to record the confession, but put him to plead *not guilty*, or at least ought also to have inquired by an inquest of office of the truth and circumstances of the fact. 2. That here he was twelve years old, and yet judgment spared, and the reason given, *Qui talis ætatis iudicium ferre non potest.* Yet 3. There is somewhat still of *gratia regis* interposed, as it seems, in respect he was past the old standard of twelve years.

II. But now let us come to the Common law as it stood in after-times, for in process of time, especially in and after the reign of king *Edward III.* the Common law received a greater perfection, not by the change of the Common law, as some have thought, for that could not be but by act of parliament: but men grew to greater learning, judgment and experience,

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by *Bracton, Lib. III. de corona, cap. 1.* to be taken at the age of fifteen; and tho there be a difference as to the age, yet probably it is the same oath, for it is very easy and natural to mistake xii for xv. See the statute of *Marlbridge,*

cap. 10 & 25. and lord Coke’s comment thereon, 2 *Inst.* 147. where he takes notice that the old books are misprinted. See also 2 *Instit.* 72. *Mirror, cap. 1. §. 3.* *Britton, cap. 12.*

perience, and rectified the mistakes of former ages and judgments, and the law in relation to infants and their punishments for capital offenses was and to this day is as followeth.

1. It is clear that an infant above fourteen and under twenty-one is equally subject to capital punishments, as well as others of full age; for it is *presumptio juris*, that after fourteen years they are *doli capaces*, and can discern between good and evil; and if the law should not animadvert upon such offenders by reason of their nonage, the kingdom would come to confusion. Experience makes us know, that every day murders, bloodsheds, burglaries, larcenies, burning of houses, rapes, clipping and counterfeiting of money, are committed by youths above fourteen and under twenty-one; and if they should have impunity by the privilege of such their minority, no man's life or estate could be safe (*t*). In my remembrance at *Thetford* a young lad of sixteen years old was convict for successive wilful burning of three dwelling-houses, and in the last of them burning a child to death, and yet had carried the matter so subtilly, that by a false accusation of another person for burning the first house an innocent person was brought in danger, if it had not been strangely discovered: he had judgment to die, and was accordingly executed. (*u*)

Fourteen years of age therefore is the common standard, at which age both males and females are by the law obnoxious to capital punishments for offenses committed by them at any time after that age; and with this agrees *Fitz. N.B. 202. b.* (*x*) *Co. Litt. §. 405.* (*y*) *Vide Mr. Dalton's Justice of Peace, cap. 95. and 104.* (*z*)

H

2. An

(*t*) Our author's argument concludes very strongly against their escaping with impunity, but loses much of its force when urged in behalf of capital punishments, for there is no necessity that if they be not capitally punished they must therefore go unpunished; so that whatever severity may be needful in cases of murders and acts of violence, yet in the common instances of larceny and stealing some other punishment might be found, which might leave room for the reformation of young offenders.

(*u*) At *Abingdon* assizes, *Feb. 23. 1629.*

before *Whitlock* justice, one *John Dean* an infant between eight and nine years was indicted, arraigned, and found guilty of burning two barns in the town of *Windsor*; and it appearing upon examination that he had malice, revenge, craft and cunning, he had judgment to be hanged, and was hanged accordingly. *MS. Report.*

(*x*) *N. Edit. p. 450.*

(*y*) *p. 247. b.*

(*z*) The first edition, but in the last edition, *cap. 147 and 157.*

2. An infant under the age of fourteen years and above the age of twelve years is not *primâ facie* presumed to be *doli capax*, and therefore regularly for a capital offense committed under fourteen years he is not to be convicted or have judgment as a felon, but may be found not guilty.

But tho' *primâ facie* and in common presumption this be true, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil at the time of the offense committed, he may be convicted and undergo judgment and execution of death, tho' he hath not attained *annum pubertatis*, viz. fourteen years; tho' according to the nature of the offense and circumstances of the case the judge may or may not in discretion reprieve him before or after judgment, in order to the obtaining the king's pardon. 12 Aff. 30. *Corone* 118 & 170. *Alice de Walborough* of the age of thirteen years was burnt by judgment for killing her mistress, and it is there said, that by the antient law none shall be hanged within age which is intended the age of discretion, viz. fourteen years; but before *Spigurnel* an infant within age (a), that had kild his companion, and hid himself (*se mucha*) was presently hanged; for it appeared by his *muching* he could discern between good and evil, and *malitia supplet etatem*.

25 E. 3. 85. *Corone* 129. One within age was found guilty of larceny, and by reason of his nonage judgment was respited, but afterwards he was brought to the bar and had his judgment; tho' this book be generally *one within age*, it must be intended within the age of discretion, viz. fourteen years, for it was never made a doubt, whether if above that age he might not have judgment.

3. But yet farther, if an infant be above seven years old and under twelve years, (which according to the antient law was *Ætas pubertati proxima*) and commit a felony, in this case *primâ facie* he is to be judged not guilty, and to be found so; because he is supposed not of discretion to judge between good and evil (b); yet even in that case, if it appear by strong
and

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(a) Ten years old according to Fitz-herbert's Report *Corone* 118. (b) *Corone* 133.

and pregnant evidence and circumstances, that he had discretion to judge between good and evil, judgment of death may be given against him. 3 H. 7. i. b. & 12. b. An infant of the age of nine years kild an infant of the like age, he confessed the felony, and upon examination it was found he hid the blood and the body; the justices held he ought to be hanged. (c)

But in cases of this nature, 1. It is necessary that very strong and pregnant evidence ought to be to convict one of that age, and to make it appear he understood what he did; for if the law require such an evidence where the offender is above twelve and under fourteen, much more if he were under twelve at the time of the fact committed. 2. The circumstances must be inquired of by the jury, and the infant is not to be convicted upon his confession. 3. It is prudence in such a case even after conviction to respite judgment, or at least execution (d); but yet I do not see how the judge can discharge him if he be convicted, but only reprieve him from judgment, and leave him in custody till the king's pleasure be known.

And therefore the book of 35 H. 6. ii. & 12. per Moyle & Billing, "That tho a jury should find such an infant guilty, the court ex officio must discharge him", must be understood either first only of a reprieve before judgment, or secondly at least, that the jury find the fact, and that he was either within the age of infancy, viz. seven years old, or that he did the fact, but was under fourteen, and not of discretion to judge between good and evil; in which case the court ex officio ought to discharge him, because it is not felony.

4. And lastly, If an infant within age be *infra etatem infantia*, viz. seven years old, he cannot be guilty of felony (e),
what

(c) But however they respited the execution that he might get a pardon. F. Coronæ 57. B. Coronæ 135. Dalton says that an infant of eight years of age may commit homicide, and shall be hanged for it. See Dalton's Justice, cap. 147.

(d) Dalr. Justice, p. 505.

(e) And yet there is a precedent in the register, fol. 309. b. of a pardon granted to an infant within the age of seven years, who was indicted for homicide; in this case the Jury found, that he did the fact before he was seven years old.

whatever circumstances proving discretion may appear; for *ex presumptione juris* he cannot have discretion (*f*), and no averment shall be received against that presumption: and altho the laws of *England*, as well as the Civil and Canon law, assign a difference between males and females as to their age of consent to marriage, *viz.* fourteen to the male, twelve to the female; yet it seems to me, that as to matters of crimes, especially in relation to capital punishments, the females have the same privilege of nonage as the males; and therefore the regular *Ætas pubertatis* in reference to capital crimes and punishments of both is fourteen years, with those various temperaments and exceptions above assigned.

And it is to be observ'd, that in all cases of infancy, insanity, &c. if a person uncapable to commit a felony be indicted by the grand inquest, and thereupon arraigned, the petit jury may either find him generally *not guilty*, or they may find the matter specially, that he committed the fact, but that he was *non compos*, or that he was under the age of fourteen, *scilicet ætatis 13 annorum*, and had not discretion to discern between good and evil, & *non per feloniam*; and thereupon the court gives judgment of acquittal. 21 H. 7. 31. (g) But if a man be arraigned in such a case upon an indictment of murder or manslaughter by the coroner's inquest, there if the party committed the fact, regularly the matter ought to be specially found, because if the jury find the party not guilty, they must inquire how he came by his death, *viz.* "Et juratores prædicti quesiti per curiam, quomodo is ad mortem suam devenit, dicunt super sacramentum suum, quod prædictus A. B. die——anno—— apud D. dum non fuit compos mentis, or dum fuit infra ætatem discretionis, scilicet 9 annorum, nec scivit discernere inter bonum & malum, prædictum J. S. cum gladio, &c. percussit & ipsum ad tunc & ibidem occidit, sed non ex malitiâ præcogitatâ, neque per feloniam, vel felleo animo; & sic idem J. S. ad mortem suam devenit." But if he be first arraigned, and acquitted upon the indictment by the grand inquest,

inquest, and found not guilty, he may plead that acquittal upon his arraignment upon the coroner's inquest, and that will discharge him; and the petit jury shall inquire farther how the party came by his death.

C H A P. IV.

Concerning the defect of ideocy, madness and lunacy, in reference to criminal offenses and punishments.

AND thus far touching that natural defect of *infancy*. Now concerning another sort of defect or incapacity, namely *ideocy, madness and lunacy*: For tho by the law of *England* no man shall avoid his own act by reason of these defects (*a*), tho his heir or executor may, yet as to capital offenses these have in some cases the advantage of this defect or incapacity (*b*); and this defect comes under the general name of *Dementia*, which is thus distinguished.

I. *Ideocy, or fatuity à nativitate vel dementia naturalis*; such a one is described by *Fitzherbert*, who knows not to tell 20 s. nor knows who is his father or mother, nor knows his own age; but if he knows letters, or can read by the instruction of another, then he is no ideot. *F. N. B.* 233. *b*. These, tho they may be evidences, yet they are too narrow and conclude not always; for *ideocy or not* is a question of fact triable by jury, and sometimes by inspection.

I

II. De-

(*a*) For it is said to be a maxim in law, that no man of full age shall be permitted to stultify himself. 4 *Co. Rep.* 123. *b*. *Beverly's case, Co. Lit.* 247. *a*. the reason hereof is, because a man cannot know

or remember what acts he did when he was of *non sane memory*. 35 *Affis. pl.* 10. See *contra F. N. B.* p. 449. *Show. Ca. Parl.* 153. 2 *Salk.* 576.

(*b*) *Co. Lit.* 247. *b*. *Plowd.* 19. *a*.

II. *Dementia accidentalis, vel adventitia*, which proceeds from several causes; sometimes from the distemper of the humours of the body, as deep melancholy or adult choler; sometimes from the violence of a disease, as a fever or palsy; sometimes from a concussion or hurt of the brain, or its membranes or organs; and as it comes from several causes, so it is of several kinds or degrees; which as to the purpose in hand may be thus distributed: 1. There is a partial insanity of mind; and 2. a total insanity.

The former is either in respect to things *quoad hoc vel illud insanire*; some persons, that have a competent use of reason in respect of some subjects, are yet under a particular *dementia* in respect of some particular discourses, subjects or applications; or else it is partial in respect of degrees; and this is the condition of very many, especially melancholy persons, who for the most part discover their defect in excessive fears and griefs, and yet are not wholly destitute of the use of reason; and this partial insanity seems not to excuse them in the committing of any offence for its matter capital; for doubtless most persons, that are felons of themselves, and others are under a degree of partial insanity, when they commit these offences: it is very difficult to define the indivisible line that divides perfect and partial insanity, but it must rest upon circumstances duly to be weighed and considered both by the judge and jury, lest on the one side there be a kind of inhumanity towards the defects of human nature, or on the other side too great an indulgence given to great crimes: the best measure that I can think of is this; such a person as labouring under melancholy distempers hath yet ordinarily as great understanding, as ordinarily a child of fourteen years hath, is such a person as may be guilty of treason or felony.

Again, a total alienation of the mind or perfect madness; this excuseth from the guilt of felony and treason (*d*); *de quibus infra*. This is that, which in my lord Coke's *Pleas of the Crown*, p. 6. is call'd by him absolute madness, and total deprivation of memory.

Again, this accidental *dementia*, whether total or partial, is distinguished into that which is permanent or fixed, and that which is interpolated, and by certain periods and vicissitudes: the former is *phrenesis* or madness, the latter is that, which is usually call'd *lunacy*, for the moon hath a great influence in all diseases of the brain, especially in this kind of *dementia*; such persons commonly in the full and change of the moon, especially about the Equinoxes and summer solstice, are usually in the height of their distemper; and therefore crimes committed by them in such their distempers are under the same judgment as those whereof we have before spoken, namely according to the measure or degree of their distemper; the person that is absolutely mad for a day, killing a man in that distemper, is equally not guilty, as if he were mad without intermission. But such persons as have their lucid intervals, (which ordinarily happens between the full and change of the moon) in such intervals have usually at least a competent use of reason, and crimes committed by them in these intervals are of the same nature, and subject to the same punishment, as if they had no such deficiency (e); nay, the alienations and contracts made by them in such intervals are obliging to their heirs and executors. (f)

Again, this accidental *dementia*, whether temporary or permanent, is either the more dangerous and pernicious, commonly call'd *furor*, *rabies*, *mania*, which commonly arises from adust choler, or the violent inflammation of the blood and spirits, which doth not only take away the use of reason, but also superadds to the unhappy state of the patient rage, fury, and tempestuous violence; or else it is such as only takes away the use and exercise of reason, leaving the person otherwise rarely noxious, such as is a deep *delirium*, *stupor*, memory quite lost, the phantasy quite broken, or extremely disorderd. And as to criminals these *dementes* are both in the same rank; if they are totally depriv'd of the use of reason, they cannot be guilty ordinarily of capital offenses, for they have not the use of understanding, and act not as reasonable creatures,

(e) *F. Coronæ* 324.

(f) 4 *Co.* 125. A.

creatures, but their actions are in effect in the condition of brutes. (g)

III. The third sort of *dementia* is that, which is *dementia affectata*, namely *drunkenness*: This vice doth deprive men of the use of reason, and puts many men into a perfect, but temporary phrenzy; and therefore, according to some Civilians (h), such a person committing *homicide* shall not be punished simply for the crime of homicide, but shall suffer for his drunkenness answerable to the nature of the crime occasioned thereby; so that yet the formal cause of his punishment is rather the drunkenness, than the crime committed in it: but by the laws of *England* such a person (i) shall have no privilege by this voluntary contracted madness, but shall have the same judgment as if he were in his right senses. *Plowd.* 19. a. *Crompt. Just.* 29. a.

But yet there seems to be two allays to be allowed in this case.

1. That if a Person by the unskilfulness of his physician, or by the contrivance of his enemies, eat or drink such a thing as causeth such a temporary or permanent phrenzy, as *aconitum* or *nux vomica*, this puts him into the same condition, in reference to crimes, as any other phrenzy, and equally excuseth him.

2. That altho the *simplex* phrenzy occasioned *immediately* by drunkenness excuse not in criminals, yet if by one or more such practices, an *habitual* or fixed phrenzy be caused, tho this madness was contracted by the vice and will of the party, yet this habitual and fixed phrenzy thereby caused puts the man into the same condition in relation to crimes, as if the same were contracted involuntarily at first.

Now touching the trial of this incapacity, and who shall be adjudged in such a degree thereof to excuse from the guilt of capital offenses, this is a matter of great difficulty, partly from the easiness of counterfeiting this disability, when it is to excuse a nocent, and partly from the variety of the degrees of this

(g) *Bract.* 420. b. *F. Corone* 193, *ruvias, Tom. 1. p. 557. in relect. ad Clem. Si furiosus. Par. III. §. 3 & 4.*

(h) *Bartholinus* and others. See *Covar-* (i) *4 Co. 125. a.*

this infirmity, whereof some are sufficient, and some are insufficient to excuse persons in capital offenses.

Yet the law of *England* hath afforded the best method of trial, that is possible, of this and all other matters of fact, namely by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses *viva voce* in the presence of the judge and jury, and by the inspection and direction of the judge.

There are two sorts of trials of ideocy, madness or lunacy; the first, in order to the commitment or custody of the person and his estate, which belongs to the king, either to his own use and benefit, as in case of *ideocy*; or to the use of the party, in case of accidental madness or *lunacy*; and in order hereunto there issues a writ (*k*) or commission to the sheriff or escheator, or particular commissioners both by their own inspection and by inquisition to inquire, and return their inquisition into the Chancery; and thereupon a grant or commitment of the party and his estate ensues; and in case the party or his friends find themselves injured by the finding him a lunatick or ideot, a special writ may issue to bring the party before the chancellor, or before the king to be inspected. *Vide Fitz. N. B.* 233. (*l*)

But this concerns not the purpose in hand; for whether the party that is supposed to commit a capital offense be thus found an ideot, madman, or lunatick, or not, yet if really he be such, he shall have the privilege of his ideocy, lunacy, or madness, to excuse him in capitals.

Secondly therefore, the trial of the incapacity of a party indicted or appealed of a capital offense is, upon his plea of *not guilty*, by the jury upon his arraignment, who are to inquire thereupon touching such incapacity of the prisoner, and whether it be to such a degree, as may excuse him from the guilt of a capital offense. (*m*)

In presumption of law every person of the age of discretion is presumed of *sane memory*, unless the contrary be proved; and this holds as well in cases civil, as criminal.

K

Again,

(*k*) See *Stamf. Prerog.* 55. *b.* (*l*) *N. Edit.* 517. (*m*) *Savil.* 50. 1 *And.* 107.

Again, if a man be a lunatick, and hath his *lucida intervalla*, and this be sufficiently proved, yet the law presumes the acts or offenses of such a person to be committed in those intervals, wherein he hath the use of reason, unless by circumstances or evidences it appears they were committed in the time of his distemper; and this also holds in civils, as well as in criminals.

And altho in civil cases he, that goes about to allege an act done in the time of lunacy, must strictly prove it so done, yet in criminal cases (where the court is to be thus far of counsel with the prisoner, as to assist him in matters of law and the true stating of the fact) if a lunatick be indicted of a capital crime, and this appears to the court, the witnesses to prove the fact may and must also be examined, whether the prisoner were under actual lunacy at the time of the offense committed.

A man, that is *furdus & mutus a nativitate*, is in presumption of law an idiot, and the rather, because he hath no possibility to understand, what is forbidden by law to be done, or under what penalties (*n*): but if it can appear, that he hath the use of understanding, which many of that condition discover by signs to a very great measure, then he may be tried, and suffer judgment and execution, tho great caution is to be used therein. (*o*)

I come now to apply what has been said to the various natures of capital crimes.

If a man in his sound memory commits a capital offense, and before his arraignment he becomes absolutely mad, he ought not by law to be arraigned during such his phrenzy, but be remitted to prison until that incapacity be removed; the reason is, because he cannot advisedly plead to the indictment; and this holds as well in cases of treason, as felony,

I

even

(*n*) Vide *Leg. Alfredi*, l. 14. *B. Coronæ* 101 & 217.

(*o*) According to 43 *Affis. pl.* 30. and 8 *H.* 4. 2. if a prisoner stands mute, it shall be inquired, whether it be wilful or by the act of God, from whence *Crompton* infers, that if it be by the act

of God, he shall not suffer. *Crompt. Just.* 29. *a.* but if one, who is both deaf and dumb, may discover by signs, that he hath the use of understanding, much more may one, who is only dumb, and consequently may be guilty of felony, *sed quære*, how he shall be arraigned.

even tho the delinquent in his found mind were examined, and confessed the offense before his arraignment: and this appears by the statute of 33 H. 8. *cap.* 20. which enacted a trial in case of treason after examination in the absence of the Party; but this statute stands repealed by the statute of 1 & 2 Phil. & Mar. *cap.* 10. *Co. P. C.* p. 6. And if such person after his plea, and before his trial, become of *non sane memory*, he shall not be tried; or, if after his trial he become of *non sane memory*, he shall not receive judgment; or, if after judgment he become of *non sane memory*, his execution shall be spared; for were he of sound memory, he might allege somewhat in stay of judgment or execution. *Co. P. C.* 4. (p)

But because there may be great fraud in this matter, yet if the crime be notorious, as *treason* or *murder*, the judge before such respite of trial or judgment may do well to impanel a jury to inquire *ex officio* touching such insanity, and whether it be real or counterfeit.

If a person of *non sane memory* commit *homicide* during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the king's grace to pardon him. 26 *Aff.* 27. 3 E. 3. *Corone* 351.

But it seems in such a case it is prudence to swear an inquest *ex officio* to inquire touching his madness, whether it was feigned; and thus it was done in the case of 3 E. 3. and in *Somervil's* case, *Anderson's Rep.* par. 1. n. 154. But in case a man in a phrenzy happen by some oversight, or by means of the gaoler to plead to his indictment, and is put upon his trial, and it appears to the court upon his trial, that he is mad, the judge in discretion may discharge the jury of him, and remit him to gaol to be tried after the recovery of his understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vite*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit it should be proceeded in the trial, in order

(p) See Sir John Hawles's remarks on *Bateman's* trial. *State Trials*, Vol. 4. p. 205.

order to his acquittal and enlargement. If a person during his insanity commit *homicide* or *petit treason*, and recover his understanding, and being indicted and arraigned for the same pleads *not guilty*, he ought to be acquitted; for by reason of his incapacity he cannot act *felleo animo*. 12 H. 3. *Dover* 183. *Forfeiture* 33. 21 H. 7. 31. *b. il alera quite*, that is, shall be found not guilty.

And it is all one, whether the phrenzy be fixd and permanent, or whether it were temporary by force of any disease, if the fact were committed while the party was under that distemper.

In the year 1668. at *Aylesbury* a married woman of good reputation being deliverd of a child, and having not slept many nights fell into a temporary phrenzy, and kild her infant in the absence of any company; but, company coming in, she told them, she had kild her infant, and there it lay; she was brought to gaol presently, and after some sleep she recovered her understanding, but marvelled how or why she came thither; she was indicted for murder, and upon her trial the whole matter appearing it was left to the jury with this direction, that if it did appear, that she had any use of reason when she did it, they were to find her guilty; but if they found her under a phrenzy, tho by reason of her late delivery and want of sleep, they should acquit her; that had there been any occasion to move her to this fact, as to hide her shame, which is ordinarily the case of such as are deliverd of bastard children and destroy them; or if there had been jealousy in her husband, that the child had been none of his, or if she had hid the infant, or denied the fact, these had been evidences, that the phrenzy was counterfeit; but none of these appearing, and the honesty and virtuous deportment of the woman in her health being known to the jury, and many circumstances of insanity appearing, the jury found her not guilty to the satisfaction of all that heard it.

Touching the great crime of *treason* regularly the same is to be said, as in case of *homicide*, such a phrenzy or insanity, as excuseth from the guilt of the one, excuseth from the guilt of the other: the reason is the same; he that cannot act *felonice*

or *animo felonico* cannot act *proditorie*, for being under a full alienation of mind, he acts not *per electionem* or *intentionem*. This appears by the statute of 33 H. 8. cap. 20. which tho it enact, that a *non compos mentis* shall be tried for treason, yet it expressly declareth, “That if any commit high treason, “ while they are in good, whole and perfect memory, and “ after examination become *non compos mentis*, and that it be “ certified by four of the council, that at the time of the “ treason they were of good, sound and perfect memory, and “ then not mad, nor lunatic, and afterwards became mad; “ then they shall proceed to trial”: which strongly enforceth, that a treason cannot be committed by a madman, or lunatic, during his lunacy.

And with this agrees my lord Coke, *P. C. p. 6.* in these words, *He that is non compos mentis, and totally deprived of all compassings and imaginations, cannot commit high treason by compassing or imagining the death of the king; for furiosus solo furore punitur; but it must be an absolute madness, and a total deprivation of memory.*

This tho it be general, yet the same author tells us, *4 Rep. 124. b. Beverly's case*, in these words, *Mes in ascun cases non compos mentis poit committe hault treason, come si il tua, ou offer a tuer le roy.* This is a safe exception, and I shall not question it, because it tends so much to the safety of the king's person: but yet the same author, *P. C. p. 6.* tells us, that tho this was antiently thought to be law, yet it is not so now; for such a person as cannot compass the death of the king by reason of his insanity, cannot be guilty of treason within the statute of 25 E. 3. And thus far concerning the incapacity of ideocy, madness and lunacy.

C H A P. V.

Concerning casualty and misfortune, how far it excuseth in criminals.

I Come to the second kind of accidental defects, viz. *casualty* and *misfortune*, and to consider how far it excuseth: and first, we are to observe in this, and likewise in some other of the defects before and hereafter mentioned, a difference between civil suits, that are terminated *in compensationem damni illati*, and criminal suits or prosecutions, that are *in vindictam criminis commissi*.

If a man be shooting in the fields at rovers, and his arrow hurts a person standing near the mark, the party hurt shall have his action of trespass, and recover his damages, tho the hurt were casual (*a*); for the party is damnified by him, and the damages are but his reparation; but if the party had been kild, it had been *per infortunium*, and the archer should not suffer death for it, tho yet he goes not altogether free from all punishment (*b*). 6 E. 4. 7. *per Catesby*. (*c*)

As to criminal proceedings, if the act, that is committed, be simply casual, and *per infortunium*, regularly that act, which, were it done *ex animi intentione*, were punishable with death, is not by the laws of *England* to undergo that punishment; for it is the will and intention, that regularly is required, as well as the act, and event, to make the offence capital.

2

Now

(a) *Hob.* 134.

(b) For he forfeits all his goods and chattels. 2 *H.* 3. 18. *F. Coronæ* 302. 2 *Co. Inst.* 149. 3 *Co. Instit.* 220. By the ancient law he was liable to make the same recompense or *weregild*, as in any other case of homicide; *c. g.* if one shooting at a mark should accidentally wound and kill another, he was nevertheless to pay his *weregild*. *Leg. H.* 2. l. 88. l. 90. *Le-*

gis enim est placitum, qui inscienter peccat, scienter emendet; but by the same law, if one, who was standing on a tree, or any other place, where he was at work, should chance to fall on another passing by, he was not to pay any thing, but was deemed intirely innocent. See *Wilk. Leg. Anglo-Sax.* p. 277, 279.

(c) *B. Coronæ* 148. *Trespas* 310. *F. Coronæ* 354.

Now, what shall be said thus simply casual, and what the punishment, will be at large considerd, when we come to homicide *per infortunium*; only something will be necessary to be said thereof here.

If a man do *ex intentione* and voluntarily an unlawful act tending to bodily hurt of any person, as by striking or beating him, tho he did not intend to kill him, but the death of the party struck doth follow thereby within the year and day (*d*); or if he strike at one, and missing him kills another, whom he did not intend, this is felony (*e*) and homicide, and not casualty or *per infortunium*.

So it is if he be doing an unlawful act, tho not intending bodily harm of any person, as throwing a stone at another's horse, if it hit a person and kill him; this is felony and homicide, and not *per infortunium* (*f*); for the act was voluntary, tho the event not intended; and therefore the act it self being unlawful, he is criminally guilty of the consequence, that follows:

But if a man be doing a lawful act without intention of any bodily harm to any person, and the death of any person thereby ensues, as if he be cleaving wood, and the ax flies from the helve, and kills another, this indeed is manslaughter, but *per infortunium*; and the party is not to suffer death, but is to be pardoned of course; for it appears by the statute of *Marlbridge, cap. 26.* that it was not done *per feloniam* (*g*):

yet

(*d*) The reason of this is, because the law doth presume, that after the year and day it cannot then be discerned, whether he died of the stroke, or a natural death. 3 *Co. Instit.* 53.

(*e*) The like in the case of maihem, if a man strike at one, and missing him maihem another. 13 *H. 7.* 14. *a.*

(*f*) 11 *H. 7.* 23. *a.* *per Fineux Ch. Jult. B. Coronæ* 229. *Proclamation* 13. 22 *Affis. pl.* 71.

(*g*) Here our author rightly says, it appears by the statute of *Marlbridge*, that it was not felony, for that statute only supposes it not to be felony, but does not make that not to be felony, which was so before, as some have imagined. 2 *Co. Instit.* 148, 215. for it appears by *Magna Charta, cap. 26.* which

was before the statute of *Marlbridge*, that he who kild another *per infortunium*, was in no danger of death. *Kel.* 123. nor indeed could it be felony, it not being done *felico animo*. 4 *Co.* 124. *b.* The design of that statute was quite of another nature, *viz.* that the country should not be amerced where a man was kild *per infortunium*, for at that time *murdrum* peculiarly signified the secret private killing of a man; as, if he was found kild, but it was not known by whom; and thus it is defined by *Brañon, Lib. III. de corona, cap. 1.* to be *occulta occisio*; and in the laws of *Henry I. l. 92.* *murdritus homo dicebatur, cujus interfector nesciebatur*; and in *Dialogo de Scaccario, Lib. I. cap. 10.* *murdrum idem est, quod absconditum.*

yet the laws of *England* are so tender of the life of man, and to make men very cautious in all their actions, that the party, tho his life be spared, yet forfeits his goods, and must expect the king's grace to restore them.

There happend this case at *Peterborough*: Deer broke into the corn of *A.* and spoiled it in the night-time; *A.* sets his servant to watch in the night with a charged gun at the corner of the field, commanding him, that, when he heard any thing rush into the standing corn, he should shoot at that place, for it was the deer: the master, who was in another corner of the field, rushed into the standing corn; the servant according to his master's direction shot, and kild his master; it was agreed on all hands, this was neither petit treason, nor murder, but whether it were simple homicide, or *per infortunium*, was a great difficulty: First, the shooting was lawful, when the deer came into the corn, it being no *purlieu*, nor proclaimed, or chased deer; again, the error of the servant was caused by the master's direction, and his own act; but if it had been a stranger, that had been kild, it had been homicide, and not misadventure: on the other side, the servant was to have taken more care, and not to have shot upon such a token, as might have befallen a man, as well as a deer; and therefore for the omission of due diligence, and better inspection, before he adventured to shoot, it might amount to manslaughter, and so be capital; and this seems to be the truer opinion.

But in the case of *Sir William Hawksworth*, related by *Baker* in his chronicle of the time of *Edward IV.* p. 223. (b), he being weary of his life, and willing to be rid of it by another's hand, blamed his parker for suffering his deer to be destroyed, and commanded him, that he should shoot the next man, that he met in his park, that would not stand or speak; the knight himself came in the night into the park, and being met by the keeper refused to stand or speak; the keeper shot, and kild him, not knowing him to be his master: this seems to be no felony, but excusable by the statute of *Malefactores in parcis* (i);
for

(b) *Sub anno* 1471.

(i) This statute was made the 21 *E. 1.* and doth expressly enact, " That if any parker find a trespasser wandering
" within

for the keeper was in no fault, but his master; but, had he known him, it had been murder.

As to matter of high treason, where the life of the king is concernd, it is not safe too easily to admit an excuse by chance or misfortune; tho such fact cannot be treason, that was purely casual and involuntary, for there must be a *compassing, or imagining* to make treason; yet a treasonable intention may be disguis'd under the colour of chance, and the safety of the king's life is of highest concernment.

And therefore when *Walter Tyrrel*, with a glance of an arrow from a tree involuntarily, as *Matthew Paris* (k) tells us, kild *William Rufus*, it could not be treason (l), because there was no purpose of any mischief, and he shot at the deer by the king's command; yet the fact was of such a consequence, that he fled for it, which was a circumstance, that might probably infer, that there was some ill intention, which might make him guilty of treason, and not barely accident. *Co. P. C. p. 6.*

History tells us, that upon a solemn just, or tournament appointed by *Henry II.* king of *France*, upon the marriage of his daughter, the king himself would needs run, and commanded the earl of *Montgomery* to run against him; the earl's lance breaking upon the king's cuirasse, a splinter flew into the king's eye, and hit it, whereof he died: this was not treason, because purely accidental.

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“ within his liberty, intending to do damage therein, and upon cry made to him to stand, he will nor yield, but fleeth or defendeth himself with force, if such parker kill such offender in en-

“ deavouring to take him, he shall not be arraigned for the same, nor suffer any punishment.” *S. P. C. 13. b.*

(k) *p. 54.*

(l) *Customier de Normand. cap. 14.*

C H A P. VI.

Concerning ignorance, and how far it prevails, to excuse in capital crimes.

Ignorance of the municipal law of the kingdom, or of the penalty thereby inflicted upon offenders, doth not excuse any, that is of the age of discretion and *compos mentis* from the penalty of the breach of it; because every person of the age of discretion and *compos mentis* is bound to know the law, and presumed so to do: *Ignorantia eorum, que quis scire tenetur, non excusat.* (a)

But in some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary; and indeed many of the cases of misfortune and casualty mentiond in the former chapter are instances, that fall in with this of ignorance: I shall add but one or two more.

It is known in war, that it is the greatest offense for a soldier to kill, or so much as to assault his general: suppose then the inferior officer sets his watch, or sentinels, and the general to try the vigilance or courage of his sentinels comes upon them in the night in the posture of an enemy, (as some commanders have too rashly done) the sentinel strikes, or shoots him; taking him to be an enemy; his ignorance of the person excuseth his offense.

In the case of *Levet* indicted for the death of *Frances Freeman*, the case was, that *William Levet* being in bed and asleep in the night his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door; she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door; the master rising suddenly, and taking

king a rapier ran down suddenly; *Frances* hid herself in the buttery, lest she should be discovered; *Levet's* wife spying *Frances* in the buttery, cried out to her husband, "Here they be, that would undo us." *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died. This was resolved to be neither murder, nor manslaughter, nor felony. Vide this case cited by justice *Jones*, P. 15 Car. 1. B. R. Cro. Car. 538. Cook's case.

C H A P. VII.

Touching incapacities, or excuses by reason of civil subjection.

I Come now to those incapacities, which I have stiled civil, and to consider, how far they indemnify and excuse in criminals, and criminal punishments.

And first concerning that, which ariseth by reason of civil subjection.

And this civil subjection is principally of the subject to his prince, the servant to his master, the child to his parent, and the wife to her husband. Somewhat I shall say of each of these:

I. As to the *first* of these subjections, the *subject* to his *prince*; it is regularly true, that the law presumes, the king will do no wrong, neither indeed can do any wrong (*a*); and therefore, if the king command an unlawful act to be done, the offence

(a) Co. Lit. 19. b.

fense of the instrument is not thereby indemnified (*b*); for tho the king is not under the coercive power of the law, yet in many cases his commands are under the directive power of the law, which consequently makes the act itself invalid, if unlawful, and so renders the instrument of the execution thereof obnoxious to the punishment of the law. Vide *Stamf. P. C.* 102. *b.* (*c*); yet in the time of peace, if two men combat together at barriers, or for trial of skill, if one kill the other, it is homicide; but if it be by the command of the king, it is said (*d*), it is no felony. 11 *H.* 7. 23. *a.*

II. As touching the civil subjection of the *child*, or *servant*; if either of them commit an act, which in itself is treason, or felony, it is neither excused nor extenuated as to the point of punishment by the command of his master, or parent; for the command is void and against law, and doth not protect either the commander or the instrument, that executes it by such command. (*e*)

III. As to the civil subjection of the *wife* to the *husband*: tho in many cases the command, or authority of the husband, either express or implied, doth not privilege the wife from capital punishment for capital offenses; yet in some cases the indulgence of the law doth privilege her from capital punishment for such offenses, as are in themselves of a capital nature; wherein these ensuing differences are observable.

1. If a *feme covert* alone without her husband, and without the coercion of her husband, commit treason, or felony, tho it be but larciny, she shall suffer the like judgment and execution, as if she were *sole*; this is agreed on all hands. *Stamf. P. C. Lib. I. cap. 19.* 15 *E.* 2. *Corone* 383.

1

2. But

(*b*) As if one man arrest another merely by the king's commandment, that shall be no excuse to him, but he is nevertheless liable to an action of false imprisonment. 16 *H.* 6. *F. Monstratus de faits* 182. 1 *H.* 7. 4. *b.* *B. Prærogative* 139.

(*c*) Vide *Bracton, Lib. III. De actionibus, cap. 9.*

(*d*) *Per Fincux* Ch. Just. but *Broke*

in his abridgment of this case, *Corone* 229. says, that other justices in the time of *Henry VIII.* denied this opinion of *Fincux*, and held, that it was felony to kill a man in jousting and the like, notwithstanding the commandment of the king; for that the commandment is against law. 3 *Co. Inst.* 56, 160.

(*e*) *Dalt. Just. cap. 157. N. Edit.*

2. But if she commit larciny by the coercion of the husband, she is not guilty. 27 *Aff.* 40. (*f*); and according to some, if it be by the command of her husband. *Ibid.* (*g*), which seems to be law, if her husband be present (*h*); but not if her husband be absent at the time and place of the felony committed.

3. But this command or coercion of the husband doth not excuse in case of treason, nor of murder, in regard of the heinousness of those crimes. Mr. *Dalton's Just. Ca.* 104. (*i*). And hence it was, that in the cases of the treasons committed by *Arden* and *Somerville* (*k*) against queen *Elizabeth* both their wives were attaint of high treason, tho their execution was spared; and yet they were only assenters to their husbands treasons, and not immediately actors in it, and so were principals in the second degree; and upon the same account the earl of *Somerset* and his wife were both attaint, as accessaries before, in the murder and poisoning of Sir *Thomas Overbury*. (*l*)

4. If the husband and wife together commit larciny or burglary, by the opinion of *Bracton*, *Lib. III. cap. 32. §. 10.* (*m*) both are guilty; and so it hath been practised by some judges. *vide Dalt. ubi supra, cap. 104.* and possibly in strictness of law, unless the actual coercion of the husband appear, she may be guilty in such a case; for it may many times fall out, that the husband doth commit larciny by the *instigation*, tho he cannot in law do it by the *coercion* of his wife; but the later practice hath obtained, that if the husband and wife commit burglary and larciny together, the wife shall be acquitted, and the husband only convicted; and with this agrees the old book, 2 *E.* 3. *Corone* 160. and this being the modern practice and *in favorem vite* is fittest to be followed; and the rather, because otherwise for the same felony the husband may be saved by the benefit of his clergy, and the

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wife

(*f*) *F. Corone* 199. *Bracton de corona, cap. 32. §. 9.*

(*g*) *Quoniam ipsa superiori suo obedire debet. Leg. Inæ, l. 57. B. Corone* 108.

(*h*) Because the law supposes her to be then under the coercion of her husband. *Kel.* 31.

(*i*) *N. Edit. cap. 157.*

(*k*) 1 *And. p.* 104.

(*l*) *Stat. Trials, Vol. I. Tr. 28 & 29.*

(*m*) *And Sect. 9. and Fleta, Lib. I. cap. 38. §. 12, 13, 14. especially, Si furtum inveniat sub Clavibus Uxoris. Vide Bracton & Fleta, ibid. and LL. Cnuti, l. 74.*

wife hanged, where the case is within clergy (*n*); tho I confess this reason is but of small value, for in manslaughter committed jointly by husband and wife the husband may have his clergy, and yet the wife is not on that account to be privileged by her coverture.

And accordingly in the modern practice, where the husband and wife, by the name of his wife, have been indicted for a larciny, or burglary jointly, and have pleaded to the indictment, and the wife convicted, and the husband acquitted; merciful judges have used to réprieve the wife before judgment, because they have thought, or at least doubted, that the indictment was void against the wife, she appearing by the indictment to be a wife, and yet charged with felony jointly with her husband.

But this is not agreeable to law, for the indictment stands good against the wife in as much as every indictment is as well several, as joint; and as upon such an indictment the wife may be acquitted, and the husband found guilty, so *converso* the wife may be convicted, and the husband acquitted; for the indictment is in law joint, or several, as the fact happens; and so is the book of 15 E. 2. *Corone* 383. and accordingly has been the frequent practice. *vide Dalt. ubi sup. cap.* 104. where there are several instances of the arraignment of husband and wife upon a joint indictment of felony; which, if by law she could not be any way guilty, had been erroneous, for the indictment itself had been insufficient: therefore, tho the former practice be merciful, and cautious, it is not agreeable to law; for, tho ordinarily according to the modern practice the wife cannot be guilty, if the husband be guilty of the same larciny or burglary; yet, if the husband upon such an indictment be acquitted, and the wife convicted, judgment ought to be given against her upon that indictment; for every indictment of that nature is joint or several as the matter falls out upon the evidence. *Vide* 22 E. 4. 7. (*o*)

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5. But

(*n*) The reason of this is, because a woman cannot by law have the benefit of the clergy. 11 Co. 29. *b.* yet in *Fitz. Corone* 461. it was admitted, that a woman might claim clergy; however, as the law

now stands, she may in all cases have the same benefit by the statute of 3 & 4 W. & M. *cap.* 9. §. 7. as a man may by his clergy.

(*o*) *B. Chartre de pardon* 51.

5. But if the husband and wife together commit a treason, murder, or homicide, tho she only assented to the treason, they shall be both found guilty, and the wife shall not be acquitted upon the presumption, that it was by the coercion of the husband, for the odiousness, and dangerous consequence of the crime; the same law it is, if she be accessary to murder before the fact.

6. If the husband commit a felony or treason, and the wife knowingly receive him, she shall neither be accessary after as to the felony, nor principal as to the treason, for such bare reception of her husband; for she is *sub potestate viri*, and she is bound to receive her husband; but otherwise it is, of the husband's receiving the wife knowingly after an offense of this nature committed by her. (p)

“ M. 37 E. 3. Rot. 34. *Linc. coram Rege. Ricardus Dey &*
 “ *Margeria Uxor ejus indictati pro receptamento felonum; Margeria*
 “ *dicit, quod indictamentum prædict' super prædictam Margeriam*
 “ *factum minus sufficiens est, eo quod præd' Margeria tempore*
 “ *quo ipsa dictos felones receptasse, seu eis consentire debuisset,*
 “ *fuit cooperta præd. Ricardo viro suo, & adhuc est, & om-*
 “ *nino sub potestate sua, cui ipsa in nullo contradicere potuit;*
 “ *& ex quo non inseritur in indictamento prædicto, quod ipsa a-*
 “ *liquod malum fecit, nec eis consentivit, seu ipsos felones recep-*
 “ *tavit, ignorante viro suo, petit judicium, si ipsa, vivente viro*
 “ *suo, de aliquo receptamento in præsentia viri sui occasionari*
 “ *possit.-----Postea viso & diligenter examinato indictamento præ-*
 “ *dicto super præfatam Margeriam facto, videtur curiæ, quod*
 “ *indictamentum illud minus sufficiens est ad ipsam inde ponere*
 “ *responsuram: Idco cesset processus versus eam omnino, &c.”*

Upon which record these things are observable:

1. That the wife, if alone and without her husband, may be accessary to a felony *post factum*. 2. But she cannot together with her husband be accessary to a felony *post factum*; for it shall be intirely adjudged the act of the husband; and this is partly the reason, why she cannot be accessary in receipt of her husband being a felon, because she is *sub potestate viri*.

3. That

3. That in this case she was not put to plead to the indictment *not guilty*, but took her exception upon the indictment itself; and so *note* the diversity between an indictment of felony, as principal, and the indictment of her, as accessory after; for in the former case she shall be put to plead *not guilty* to the indictment, tho it appear in the body thereof, that she is *covert*. 4. That yet the indictment stood good, as to the husband; and upon this consideration, tho it is true the husband and wife may be guilty of a treason, as is before shewn, yet it seems, she shall never be adjudged a traitor barely for receiving her husband, that is a traitor, or for receiving jointly with her husband any other person, that is a traitor, unless she were also consenting to the treason, for it shall be intirely adjudged the act of her husband.

It is certain, a *feme covert* may be guilty of misprision of treason committed by another man than her husband; but whether she can be guilty of misprision of treason, if she knows her husband's treason, and reveal it not, is a case of some difficulty: on the one side the great obligation of duty she owes to the safety of the king and kingdom, the horridness of the offense of treason, and the great danger, that may ensue by concealing it, seems to render her guilty of misprision of treason, if she should not detect it; on the other side, it may be said, she is *sub potestate viri*, she cannot by law be a witness against her husband, and therefore cannot accuse him. *Ideo quere*. But certainly, if she consented to the treason of her husband, tho he were the only actor in it, she is guilty as a principal, and hath no privilege herein by her coverture, as is before shewn.

C H A P. VIII.

Concerning the civil incapacities by compulsion and fear.

I join these two incapacities together, because they are much of the same nature, as to many purposes; and how far these give a privilege, exemption, or mitigation in capital punishments, is now to be considered.

First, There is to be observ'd a difference between the times of war, or public insurrection, or rebellion, and the times of peace; for in the times of war, and public rebellion, when a person is under so great a power, that he cannot resist or avoid, the law in some cases allows an impunity for parties compeld, or drawn by fear of death, to do some acts in themselves capital, which admit no excuse in the time of peace.

M. 21 E. 3. *coram Rege. Rot. 101. Line.* “Walter de Alynngton, and divers of his confederates at St. Botolph’s Regiam potestatem assumentes, & ut de Guerrâ insurgentes, quendam Thomam de Okeham sutorem in capitaneum, & majorem suum eligerunt”, seized on two ships, and took away the corn (a); appointed a bell to be rung (b); and commanded, that at the ringing thereof *ipsi & eorum quilibet essent parati, &c.* “Et plures homines ville predictæ, qui ad maleficia sua consentire noluerunt, ceperunt, & eos sibi jurare fecerunt ad imprisas suas manutenendas.” They were arraigned upon the indictment, and committed: “Illi, qui coacti fuerunt jurare, dimittuntur per manucaptionem; & illi, qui receperunt denarios, petunt quod, ex quo patet per indictmentum predictum, quod ipsi coacti fuerunt recipere denarios contra voluntatem suam, petunt, quod possint quieti recedere; & consideratum

(a) One hundred and twenty quarters of corn, value 36*l.*

(b) *Quandam communem campanam ordinaverunt pulsari.*

“ ratum est per curiam, quod nihil mali in his reperitur ; sed
 “ quia curia nondum advisatur, dies datus est per manucaptionem ;
 “ ideo venit jurata.” I find no further proceeding against
 them.

M. 7 H. 5. coram Rege. Rot. 20. Heref. cited Co. P. C. p. 10.
 Those, that supplied with victuals Sir John Oldcastle, and his
 accomplices then in rebellion, as is said, were acquitted by
 judgment of the court ; because it was found to be done *pro*
timore mortis, & *quod recesserunt, quam cito potuerunt* : note,
 it was only furnishing of victuals, and *pro timore mortis*,
 which excused them : for after the battle of *Evesham* in 49
 H. 3. when that prudent act was made for the settling of the
 kingdom, called *Dictum de Kenilworth*, those, that were drawn
 to assist the barons against the king, tho they were not put
 into the rank of those, that paid five years value, of their
 lands for their assistance, *viz.* those, that *gratis*, & *volunta-*
rie, & *non coacti miserunt servitia sua contra regem, & ejus fi-*
lium (c) ; yet, it seems, they were put to a smaller mulct ; for
 by the 12th, 13th, 14th, and 15th articles : “ *Coacti, vel me-*
 “ *tu ducti, qui venerunt ad bella, nec pugnaverunt, nec male*
 “ *fecerunt ; impotentes, qui vi vel metu coacti miserunt servi-*
 “ *tia sua contra regem, vel ejus filium ; coacti, vel metu ducti,*
 “ *qui fuerunt depraedatores, & cum principalibus praedonibus prae-*
 “ *dationes fecerunt, & quando commodè potuerunt, recesserunt,*
 “ *& ad domos redierunt ; [emptores scienter rerum alienarum*
 “ *valorem bonorum, que emerunt, restituant, & in misericor-*
 “ *dia domini regis sint, quia contra justitiam fecerunt, quia rex*
 “ *inhibuit, jam dimidio anno elapso ;]* illi, qui ad mandatum comi-
 “ *tis Leycestriae ingressi sunt Northampton, nec pugnaverunt, nec*
 “ *malum fecerunt, sed ad Ecclesiam fugerunt, quando regem veni-*
 “ *entem viderunt, & hoc sit attinendum per bonos, solvant,*
 “ *quantum valet terra eorum per dimidium annum ; illi, qui ex*
 “ *feodo comitis tenebant, sint solum in misericordia domini regis :*
 “ *impotentes,*

(c) Nor into the rank of those, who
 by lies and falshood had drawn off others
 to the earl of *Leicester's* party, and were
 punished with a mulct of two years val-
 ue, as by *artic. 11.* “ *Laici manifeste*
 “ *procurantes negotia comitis Leycestriae*

“ *& complicitum suorum, attrahendo ho-*
 “ *mines per mendacia & falsitates, insti-*
 “ *gando parti comitis & suorum. detra-*
 “ *hendo parti regis & filii sui, puniantur*
 “ *per quantum valet terra eorum per*
 “ *duos annos.*”

“ *impotentes, & alii homines, qui nihil mali fecerunt, statim*
“ *rehabeant terras suas, & damna recuperent in curia domini*
“ *regis.*”

But even in such cases, if the whole circumstances of the case be such, that he can sufficiently resist, or avoid the power of such rebels, he is inexcusable, if upon a pretence of fear, or doubt of compulsion, he assist them.

Now as to times and places of peace.

If a man be menaced with death, unless he will commit an act of treason, murder, or robbery, the fear of death doth not excuse him, if he commit the fact; for the law hath provided a sufficient remedy against such fears by applying himself to the courts and officers of justice for a writ or precept *de securitate pacis.* (*d*)

Again, if a man be desperately assaulted, and in peril of death, and cannot otherwise escape, unless to satisfy his assailant's fury he will kill an innocent person then present, the fear and actual force will not acquit him of the crime and punishment of murder, if he commit the fact; for he ought rather to die himself, than kill an innocent: but if he cannot otherwise save his own life, the law permits him in his own defense to kill the assailant; for by the violence of the assault, and the offense committed upon him by the assailant himself, the law of nature, and necessity hath made him his own *protector cum debito moderamine inculpatae tutelæ*, as shall be farther shewed, when we come to the chapter of homicide *se defendendo.* (*)

But yet farther; it is true in cases of war between sovereign princes the law of nations allows a prince to begin hostility with such a prince, that designs a war against him; and if the fear be real, and upon just ground, *non tantum de potentiâ sed & de Animo.* *Grot. de jure belli & Pacis, Lib. II. cap. 22. §. 5.* he may prevent the other's actual aggression, and need not expect, till the other actually invade him, when possibly it may be too late to make a safe defense; and the reason is, because they are not under any superior, that may
by

(*d*) See this writ in the *Register; fol. 88. b. F. N. B. Vet. Edit. 79. N. Edit. 177.*

(*) *Peslea cap. 33.*

by his process or interposition secure the prince against such a just fear; and therefore in such case the law of nations allows a prince to provide for his own safety.

But it is otherwise between subjects of the same prince: If *A.* fears upon just grounds, that *B.* intends to kill him, and is assured, that he provides weapons, and lies in wait so to do; yet without an actual assault by *B.* upon *A.* or upon his house, to commit that fact, *A.* may not kill *B.* by way of prevention; but he must avoid the danger by flight, or other means; for a bare fear, tho upon a just cause, and tho it be upon a fear of life, gives not a man power to take away the life of another, but it must be an actual and inevitable danger of his own life; for the law hath provided a security for him by flight, and recourse to the civil magistrate for protection by a writ or precept *de securitate pacis*: and thus far touching the privilege by reason of compulsion or fear.

C H A P. IX.

Concerning the privilege by reason of necessity.

ALtho all compulsion carry with it somewhat of necessity, and abates somewhat of the voluntariness of the act that is done, yet there are some kinds of necessities, that are not by any external compulsion or force.

Touching the necessity of self-preservation against an injurious assault somewhat hath been said in the last chapter, and more will be said hereafter in its due place: I shall proceed therefore to other instances.

The necessity of the preservation of the peace of the kingdom by the apprehending notorious malefactors excuseth some acts from being felony, which in the matter of them without such necessity were felony.

If a thief resist, and will not suffer himself to be taken upon hue and cry or pursuit, *justiciari se nolit permittere*, if he be kild by the pursuants, it is no felony (a); *de quo vide latius infra*.

By the statutes of 3 & 4 E. 6. cap. 5. and 1 Mar. cap. 12. If there be a riotous assembly to the number of twelve assembled to commit the disorders mentioned in those acts, the justices of peace, the sheriff, mayor, or other officer of any corporation, &c. may raise a power to suppress and apprehend them; and, if they disperse not upon proclamation, if any of the rioters be kild, or maimed, or hurt by the justices, &c. or those assembled by them to suppress the riot, it is by this act punishable.

It is true, this act (b) continued only during queen Elizabeth's life, and is now expired (c); but altho, perchance, as to the killing of such persons, as do not presently return upon proclamation to their homes, it needs the aid of an act of parliament to indemnify them; yet if they attempt any riotous act, and cannot be otherwise suppressed, the sheriff, or justice of peace may make use of such a force upon them for preservation of the peace, as well by the Common law, as by the statute; *quod vide in Anderson's Rep. part 2. n. 49. p. 67. Burton's case in fine*; and the statute of 13 H. 4. cap. 7. *in principio*, and 2 H. 5. cap. 8. whereby all men are bound upon warning to be assistant to the sheriff and justice for the suppressing of riots even by force, if it cannot be otherwise effected; so that the clauses touching this matter in the temporary statutes of 3 & 4 E. 6. and 1 Mar. are but pursuant to the law and former statutes for necessity of preserving the peace.

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Some

(a) See *Leg. Int.*, l. 35.

(b) viz. 1 Mar. cap. 12. for 3 & 4 Ed. 6. cap. 5. was repealed by 1 Mar. cap. 12.

(c) It was at first made to continue only till the end of the next session, but was afterwards by several new acts conti-

nued during the life of queen Mary; and by 1 Eliz. cap. 16. was continued during her life also, and has never since been revived; but in 1 Geo. 1. cap. 5. a new act was made to much the same purpose, which is perpetual.

Some of the casuists, and particularly *Covarruvias*, *Tom. I. De furti & Rapinæ restitutione*, §. 3, 4. p. 473. and *Grotius de jure belli ac pacis*, *Lib. II. cap. 2. §. 6. (d)*, tell us, that in case of extreme necessity, either of hunger or clothing, the civil distributions of property cease, and by a kind of tacit condition the first community doth return, and upon this those common assertions are grounded; “*Quicquid necessitas cogit, defendit.*” “*Necessitas est lex temporis & loci.*” “*In casu extremæ necessitatis omnia sunt communia.*” and therefore in such case theft is no theft, or at least not punishable, as theft; and some even of our own lawyers (*e*) have asserted the same; and very bad use hath been made of this concession by some of the Jesuitical casuists in *France*, who have thereupon advised apprentices, and servants to rob their masters, when they have judged themselves in want of necessaries, of clothes, or victuals; whereof, they tell them, they themselves are the competent judges; and by this means let loose, as much as they can, by their doctrine of probability, all the ligaments of property and civil society.

I do therefore take it, that, where persons live under the same civil government, as here in *England*, that rule, at least by the laws of *England*, is false; and therefore, if a person being under necessity for want of victuals, or clothes, shall upon that account clandestinely, and *animo furandi* steal another man's goods, it is felony (*f*), and a crime by the laws of *England* punishable with death; altho the judge, before whom the trial is, in this case (as in other cases of extremity) be by the laws of *England* intrusted with a power to relieve the offender before or after judgment in order to the obtaining the king's mercy.

For 1. Mens properties would be under a strange insecurity, being laid open to other mens necessities, whereof no man can possibly judge, but the party himself.

2. Because by the laws of this kingdom (*g*) sufficient provision is made for the supply of such necessities by collections for

(d) See *Puff. de jure naturæ*, *Lib. II. Plovd. 18. b. 19. a. Dalt. Just. cap. 99. cap. 6. §. 6.*

(f) See *Dalton ubi supra.*

(e) *Briton, cap. 10. Crompt. 33. a.*

(g) 43 *Eliz. cap. 2. &c.*

for the poor, and by the power of the civil magistrate; and consonant hereunto seems to be the law even among the *Jews*, if we may believe the wisest of kings. *Proverbs* vi. 30, 31. “ *Men do not despise a thief, if he steal to satisfy his soul, when he is hungry; but if he be found, he shall restore seven-fold, and shall give all the substance of his house.*” It is true, death was not among them the penalty of theft, yet his necessity gave him no exemption from the ordinary punishment inflicted by their law upon that offense. (b)

Indeed this rule, “ *in casu extremae necessitatis omnia sunt communia,*” does hold in some measure in some particular cases, where by the tacit consent of nations, or of some particular countries or societies, it hath obtained.

1. Among the *Jews* it was lawful in case of hunger to pull ears of standing corn, and eat, *Math.* xii. 1. &c. (i) and for one, that passed through a vineyard, or oliveyard, to gather, and eat without carrying away. *Deut.* xxiii. 24, 25.

2. By the *Rhodian* law (k), and the common maritime custom, if the common provision for the ship’s company fail, the master may under certain temperaments break open the private chests of the mariners or passengers, and make a distribution of that particular and private provision for the preservation of the ship’s company. *Vide Consolato del Maré, cap.* 256. (l) *Le customs de la Mere, p.* 77.

3. Nay, I find, among our *English* voyages to the *West-Indies* described by *Hackluit*, that it was a received custom, that if a ship wanted necessaries, and the inhabitants of the continent would not furnish them for money, they might, by the usage of the sea and nations take provision by force, making the inhabitants reasonable satisfaction; for in these cases the common consent of nations hath made it lawful, and therefore it is lawful; 1. because necessary in extremity,
2. be-

(b) But their ordinary punishment being only pecuniary could affect him only, when he was in a condition to answer it; and therefore the same reasons, which would justify that, can by no means be extended to a corporal, much less to a capital punishment.

(i) For the *Pharisees* objected against

it only on account of its being done on the *sabbath-day*, *Mark* xi. 23, &c. *Luke* vi. 1, &c.

(k) *Vide Dig. Lib. XIV. tit. 2. de lege Rhodia de jactu, l. 2. §. 2. in fine, Leg. Gulielmi Conquest. cap.* 38.

(l) Printed at *Venice* 1584. in 4to.

2. because there are no other means to obtain it by an application to superiors; but were this done by *English* mariners upon the *English* shore, where both are under the same civil magistrate, the case would be otherwise, because capable of another remedy.

It is not lawful voluntarily to assist the king's enemies with money or provision, for it is an adhering to the king's enemies, and so treason within the letter of the statute of 25 E. 3. but yet, if the king's enemies come into a county with a power too strong for the county to resist, and will plunder the country, unless a composition be made with them, such a ransoming of themselves is so far from being treason, that it hath been allowed as lawful. 1. In respect of the extreme necessity. 2. Because it is a less detriment to the country, and a less supply to the enemy, than that plunder would be; and for that purpose I shall set down the case at large.

M. 14 E. 2. B. R. Rot. 60. *Dunelm.* “ Placitum de transgress. coram A. D. de Brome & fociis suis justiciariis domini regis in episcopatu *Dunelm.* sede vacante anno decimo regni sui mittitur huc propter errores, &c. Juratores dicunt, quod Scoti inimici & rebelles regis prædict. die Martis in festo Sanctæ *Catharinæ* virginis anno regni regis nunc nono ingressi fuerunt terram episcopatus *Dunelm.* eâ de causâ, ut ipsam destruerent, & quod omnes de communitate episcopatus prædicti tunc apud *Dunelm.* existentes, volentes præcavere dictorum inimicorum malitiam, ordinârunt, quod unusquisque illorum præstarent sacramentum corporale stare ordinationi, quæ pro proficuo communitatis prædictæ contingeret ordinari, qui quidem *Willielmus de Heberne* jurat' fuit cum aliis, &c. Item quod post consuluerunt facere finem cum prædictis inimicis, & cum eis fecerunt finem de mille & sexcent' marc'; quam quidem summam oporteret solvi incontinenti, per quod, quia non habuerunt pecuniam prestò, ordinârunt, quod quidam de communitate prædicta irent de domo in domum infra ball. *Dunelm.* & extra, & perscrutarent, ubi denarii essent in deposito, & ubicunq; denarii hujusmodi invenirentur, caperentur ad solutionem dicti finis festinand', quousq; levari possit de communitat. prædict. & fa-

“ & satisfieri illis, quorum denarii sic capiendi fuerunt; et
 “ quod prædictus *Willielmus de Kellawe* simul cum quodam
 “ *David de Rotheber* jurat’ ad perferendum in formâ præ-
 “ dictâ venit ad prædictas domos, & cistam & 70 l. de pro-
 “ priis denariis ipsius *Willielmi de Heberne* in cista prædicta in-
 “ ventas cepit & asportavit, &c. et juratores requisiti, si
 “ prædictus *Willielmus de Heberne* consentiebat captioni præ-
 “ dictorum denariorum, dicunt, quod non, & quia comper-
 “ tum est, &c. quod, ubi prædicta ordinatio fuit facta de
 “ denariis in deposito perferend’ & capiend’, prædict’ *Wil-*
 “ *lielmus de Kellawe* simul, &c. cepit denarios prædict’, qui
 “ fuerunt in domo & propriâ custodiâ prædicti *Willielmi de*
 “ *Heberne* & contra voluntatem suam, & etiam pro eo,
 “ quod videtur curiæ, quod prædict’ *Willielmus de Heberne* om-
 “ nino esset sine recuperare, quoad denar’ suos prædict’, nisi
 “ esset versus præfat’ *Willielmum de Kellawe*, &c. qui prædictos
 “ denarios in formâ prædicta cepit & asportavit, consideratum
 “ est, quod prædict. *Willielmus de Heberne* recuperet versus præ-
 “ dict. *Willielmum de Kellawe* prædictos denarios & dampna
 “ sua, quæ taxantur ad c. s. & idem *Willielmus de Kellawe*
 “ committatur goalæ, &c. prætextu cujus recordi ad sectam
 “ prædicti *Willielmi de Kellawe*, afferentis errores & defectus in
 “ prædictis recordo & processu interesse, mandatum fuit e-
 “ piscopo *Dunelm.* quod scire fac’ prædicto *Willielmo de He-*
 “ *berne*, &c. qui non venit.

“ Ideo processum est ad examinationem recordi per ejus
 “ defaultum, & assignat hos errores, primùm, quod nihil fecit
 “ contra pacem regis, nec denarios illos cepit vi & armis,
 “ maximè cum prædictus *Willielmus de Heberne* juratus fuit
 “ stare ordinationi prædictæ, & quod ipse *Willielmus de Kellawe*
 “ per sacramentum præhibitum injunctus fuit scrutari & de-
 “ narios prædictos capere; & non est consonum, quod dictus
 “ *Heberne* recuperaret prædictos denarios & dampnum contra
 “ assensum & juramentum suum proprium, nec quod ipse
 “ *Kellawe* committeretur gaolæ.

“ Item in hoc quod justic’ fundaverunt judicium suum,
 “ quod dictus *Heberne* non posset habere suum recuperare de
 “ denariis prædictis, cum illud habere posset directè versus

“ communitatem virtute ordinationis & concessionis prædictarum, &c. ob quos errores hic in judicio recitatos consideratum est, quod erroneè in primo judicio processum est, & quod idem *Kellave* a gaola deliberetur, & totus processus evacuetur, &c.”

In Pasch. 15. *Ror.* 17. “ Patet, quod Scoti cum hominibus de *Rippon* similiter concordârunt pro mille marc’, nè villa comburetur.”

Nota, this was an act done for the security of the country in a time of actual war and invasion by enemies, and therefore rendred that by-law and the execution thereof justifiable by reason of that necessity, which would hardly have done it in time of peace. 2. But that, which this record principally evidenceth, is, that such a supply of the king’s enemies upon such a necessity in a time of war, and to prevent the devastation of the country, was not taken at all to be an adhering to, or treasonable aiding of the king’s enemies.

C H A P. X.

Concerning the offense of high treason, the person against whom committed, and the reason of the greatness of the offense; and touching alligeance.

HAVING premised these general observations relating to all crimes, that are capital, and their punishments, I shall now descend to consider of capital crimes particularly, and therein first of high treason.

And yet, before I descend to the particulars thereof, I shall premise also some things in general touching alligeance, since the specification of this offense consists principally in this aggravation, that it is *contra ligeantia sue debitum*.

The offense of high treason is an offense, that more immediately is against the person or government of the king; and the greatness of the offense, and the severity of the punishment is upon these two reasons.

1. Because the safety, peace, and tranquillity of the kingdom is highly concerned in the safety and preservation of the person, dignity, and government of the king; and therefore the laws of the kingdom have given all possible security to the king's person and government under the severest penalties.

2. Because as the subject hath his protection from the king and his laws, so on the other side the subject is bound by his allegiance to be true and faithful to the king; and hence all indictments of high treason run *proditorie*, as a breach of the trust, that is owing to the king, *contra ligeantia sue debitum*, against that faith and allegiance he owes to the king, and *contra pacem domini regis, coronam, & dignitatem ejus*.

And hence it is, that if an alien enemy come into this kingdom hostilely to invade it, if he be taken, he shall be dealt with as an enemy, but not as a traitor, because he violates no trust nor allegiance: resolved in the lord *Herise's* case. *Co. P. C. cap. 1. p. 11. 7 Co. Rep. 6. a. Perkin Warbeck's case.*

But if an alien, the subject of a foreign prince in amity with the king live here, and enjoy the benefit of the king's protection, and commit a treason, he shall be judged and executed, as a traitor; for he owes a local allegiance. *7 Co. Rep. 6. the case of Stephano Ferrara (a) a Portugueze*; and the indictment shall not run *contra naturalem dominum*, but *contra dominum suum*, and conclude *contra ligeantia sue debitum*, and such an alien was compellible to take the oath of allegiance in the leet. *2 Co. Instit. p. 121. (b)*

If a merchant subject of a foreign prince in hostility with our king come hither, after the war begun, without the king's licence, or safe conduct, such a person may be dealt with as an enemy, *viz.* taken, and ransomed. *Mag. Chart. cap. 30. (c)*

By

(a) And *Emanuel Loxes Tinoco. Hill. 36 Eliz.*

(b) *Mirror de justice, cap. 5. §. 1. n. 6.*
(c) *2 Co. Instit. 58.*

By that statute merchants of an hostile country found in this realm at the beginning of the war shall be attached without harm to their body or goods, till it be known, how the *Englisch* merchants are used in the hostile country; and if the *Englisch* merchants be well used there, theirs shall be likewise used here; so that in this case such merchants, tho alien enemies, have the benefit of the king's protection, and so owe a local alligance, which if they violate, they may be dealt with as traitors, not as enemies, for they have the advantage of the king's protection, as well as his other subjects; yea, it seems also, that if the subject of a forein prince lives here as a private man, and then war is proclaimed betwixt our king and that forein prince, and yet that alien continues here in *England* without returning to his natural sovereign, but under the cover and protection of the king of *England* commits a treason, he shall be judged and executed as a traitor; for by continuing here he continues the owning of his former local alligance.

Yet for the greater security in the times of hostility between this and forein kingdoms, especially that of *France*, there went out precepts under the great seal to arrest all those of that hostile kingdom, until they gave surety, *quod se bene gerent erga regem, & quod sua bona non transferent sine licentiâ regis, & quod literas aut nuncios non mittent ad partes externas, nec aliquid contra pacem attemptabunt.* Rot. *Vascon.* 18 E. II. M. 24, 23 & 21. *Dorso.* And sometimes those aliens were constrained actually to swear fealty to the crown of *England* in the times of hostility, and thereby to superadd an actual alligance to that local alligance, which they had being under the king's protection as subjects, tho in truth they were the natural subjects of the hostile prince. *Pat.* 14 H. 6. *part.* 2. *m.* 34 & 35. and, if they refused, were either imprisoned, or expelled the kingdom. *Vide infra cap.* 15.

And upon the same account it is, that, tho there be an usurper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise treason against his person; and therefore, altho the true prince regain the sovereignty, yet such attempts against the

usurper in compassing his death have been punished as treason, unless they were attempts made in the right of the rightful prince, or in aid or assistance of him, because of the breach of ligeance, that was temporarily due to him, that was king *de facto*; and thus it was done 4 E. 4. 9 E. 4. 1. (d) tho H. 6. was declared an usurper by act of parliament 1 E. 4. and therefore king *Edward IV.* punished *Ralph Gray* with degradation, as well as death, not only for his rebellion against himself, but also *pur cause de son perjury & doubleness, q'il a voit fait al roy H. 6. 4 E. 4. 20.*

And because high treason is said to be *contra ligeantia debitum*, it will not be amiss to premise something touching alligeance and its kinds, referring myself to 7 Co. Rep. Calvin's case, in relation to what is here omitted touching it.

Alligeance therefore due to the king is of two kinds: 1. Original, virtual, and implied. 2. Express, and declared by oaths or promises.

The virtual or implied alligeance is that, which the subject owes to his sovereign antecedently to any express promise, oath, or engagement: this is that, which the *Customier de Normandie* mentions cap. 13. *Aliance & la loyaulte de tous ses homes de toute la contrée, par quoy ils sont tenus a lui donner conseil & ayde de leurs propres corps contre toutes personnes qui peuvent vivre & mouryr, & soy garder de lui nuire en toutes choses ne de soustenir in aucune chose la partie de ceulx qui parlent contre luy.*

And from the breach of this original ligeance ariseth the crime of treason, tho the person committing it never promised or swore faith or alligeance to his prince: for as the king by the very descent of the crown is fully invested with the right of sovereignty before his coronation, (which is only a magnificent solemnity attending that, which is before settled in the prince by the descent of the crown,) so the subject is bound to his king by an intrinsic alligeance before the superinduction of those express bonds of oath, homage, and fealty, which were instituted for the better securing thereof.

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(d) It was not done in this case, but only it is said by the counsel, that it may be done.

And this alligeance is either natural from all that are subjects born within the king's alligeance; or local, which obligeth all, that are resident within the king's dominions, and partake of the benefit of the king's protection, altho strangers born.

The breach of this primitive or virtual alligeance is that, which is called high treason; what shall be said a breach of this alligeance, so as to make a person guilty of treason, shall be shewn hereafter.

The exprefs or explicite alligeance consists in certain promises, oaths, or professions attesting and witnessing that alligeance, and instituted for the farther security thereof; and they are of two kinds; first, those, which were antiently instituted by the Common law, namely the oath of fidelity and alligeance, and the profession of lige homage; and such, as are instituted by act of parliament, namely the oath of supremacy instituted by the statute of 1 *Eliz.* (e), and the oath of obedience instituted by the statute of 3 *Jacobi* (f). Something I shall say of all these.

The oath of fidelity or fealty is of two kinds: 1. That which is due by tenure, whether of the king, or of mesne lords, which is *ratione feodi vel vassalagii*, and hath a special relation to the lands so held, and is set down by *Littleton*, §. 19. "Hear ye, my lord, I shall be faithful and loyal
" and faith to you shall bear for the tenements, which I
" claim to hold of you, and I shall lawfully do to you the
" customs and services, which I ought to do at the terms
" assigned. *So help me God.*"

Touching this feudal fealty, or fealty by reason of tenure, I have not much to do in this place. The other kind of fealty is that oath, which is called *fidelitas ligea*, or *alligeance*, and performed only to a sovereign prince; and therefore regularly ought to be performed by all men above the age of twelve years, whether they hold any lands, or not. The te-

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(e) cap. 1.

(f) cap. 4. [vide 7 *Jac.* I. cap. 2 & 6. 13 *Car.* II. St. 2. cap. 1. 13 & 14 *Car.* II. cap. 3 & 4. 25 *Car.* II. cap. 2. 30 *Car.* II. St. 2. cap. 1.] But these oaths are abrogated by 1 *W. & M.* Sess. 1. cap. 1 & 8. andnew ones appointed in their room; see 1 *W. & M.* Sess. 2. cap. 2. §. 3. and 3 *W. & M.* cap. 2. 13 *W.* 3. cap. 6. 1 *Annæ*, cap. 22. 4 *Annæ*, cap. 8. 6 *Annæ*, cap. 7, 14, 23. 1 *Geo.* I. cap. 13, &c.

nor of this oath according to *Fleta, Lib. III. cap. 16.* (g) runs thus: “Hoc auditis, circumstantes, quod fidem regi portabo
“ de vita, & membris, & terreno honore, & arma contra
“ ipsum non portabo: sic me Deus, &c.”

According to *Britton*, who wrote about 5 E. 1. *cap. 29.* (which is also mentiond in *Calvin's case, 7 Co. Rep. 6.*) the common form of the oath of alligeance taken in leets runs thus: “Ceo oyes vous N. bailife, que jéo A. de ceo jour en
“ avaut ferray feal, & leal a nostre feigniour E. roy d'Angle-
“ terre, & a fes heires, & foy & lealte lui porteray de vie, &
“ de membre, & de terrien honour, & que jéo lour mal, ne
“ lour damage ne saveray, ne orray, que jéo ne le defendray
“ a mon poyer: si moy eyde Dieu & les seyntz.” This is the form of the antient oath of alligeance, or fidelity to the king, and as it is used at this day; and he, that is minded to see the antiquity of it, may read thereof 7 *Co. Rep. 6. Calvin's case, Spelman's Gloss. Titulo Fidelitas*, which carry it up as high as king *Arthur*; more particularly it was established by the laws of the Confessor (b), and by the laws of king *William I. quod vide in Spicilegiis Seldeni ad Edmerum lege 52.* (i)
“ Statuimus, ut omnes liberi homines foedere & sacramento
“ affirmant, quod intra & extra universum regnum Angliæ
“ *Willielmo* regi domino suo fideles esse volunt, terras & ho-
“ nores illius omni fidelitate ubique servare cum eo & contra
“ inimicos & alienigenas defendere.” (k)

And herein the prudence of the Common law is observable; the antient oath of alligeance, 1. was short, and plain, not intangled with long and intricate clauses or declarations, but the sense of it is obvious to the most common understanding, and yet, 2. it is comprehensive of the whole duty of the subject to his prince, and therefore hath obtaind for above six hundred years in this kingdom; and if any difficulties should occur in the sense or extent thereof, length of time

(g) *sect. 22.*

(b) l. 35. but these laws are evidently spurious, and seem to be the composition of some lawyer after the reign of *William II. Vide Hickeysii Dissert. Epist. p. 95.* and even in the best MS. copies of these laws the legendary account of

king *Arthur* is omitted.

(i) *Vide Leg. Anglo-Sax. Edit. Wilkins, p. 228. Edit. Lambard, p. 170.*

(k) *Vide Assisas Henrici regis factas apud Clarendon & renovatas apud Northampton. Hoveden, p. 314. Edit. Savil.*

time and long experience and practice hath sufficiently expounded it.

I shall subjoin some observables concerning this oath, which indeed explain that implied and virtual alligance; whereof before.

1. By whom this oath is to be taken: It is to be taken by all persons above the age of twelve years; whether denizens or aliens, 2 *Co. Instit.* p. 121. except women, earls, prelates, barons, and men of religion according to *Britton, cap.* 12. which exception is not to be absolutely and universally understood; for all persons above the age of twelve years are bound to take this oath of alligance, except women, as shall be shewn, but not in the same manner or place, as others; but because regularly this oath was to be taken in the leet, or at least in the sheriff's turn, which is in nature of a leet, where earls, barons, prelates, and men of religion were not bound to do their suit, therefore by the statute of *Marlbr. cap.* 10. is this exception added: but yet at other times and in other places men of religion and noblemen were to take it, as shall be shewn.

It differs from the oath of fealty performd to the king by tenure, for that includes somewhat more, and somewhat less; and according to *Britton, cap.* 68. (1) runs thus when performd to the king: "*Ceo oyes vous bone gents qe jeo J. S. foy a nostre seignior le roy Edward porterai de ceo jour en auaunt de vie & de membre, de cors & de chateux, & de terrene honor, & les services qe a lui appendent de fees & de tenements, que jeo teigne de lui, leaument les ferray as termes dues a mon poer: si moy ayde Dieu & les Seyntz, &c.*"

Now, besides this oath of fealty or alligance to the king, there were antiently certain oaths administred to persons of a different age; but these have been long disused, as namely that, which *Britton* mentions *cap.* 12. viz. that all above the age of fourteen years (m) should swear to be true and faithful to the king, and that they should not be felons nor assenters to felons, excepting men of religion, women, clerks, knights, and

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(1) §. 479.

(m) This probably should be twelve years. See 2 *Co. Instit.* 147. *vide supra in notis, p.* 24.

and their eldest sons (*n*); and of the like nature was that oath appointed by king *Henry III.* to be taken by all men above fifteen years, consisting of divers particulars in order to the preservation of the peace, and mentiond at large by *Bracton, Lib. III. Tract. 2. cap. 1. de Corona*; both which it seems were temporary provisions for preservation of the peace, and therefore administred to persons above fourteen and fifteen years, and differd from this settled oath of alligance above mentioned.

2. What kind of oath of fidelity this is: As there is *homagium ligeum*, and *homagium simplex*, so there is *fidelitas ligea* and *fidelitas simplex*; this, that is performd to the king, is *fidelitas ligea*, and differs from the later. 1. In that this is performd to a *king*, the other to a *mesne lord*. 2. This is performd without relation to any tenure of lands. 3. This is without exception of the fidelity to any person, that is always *salvâ fide & ligéantiâ domini regis*:

Yet there seems to be a double kind of lige fealty: as where there is a prince, that is subordinate to another, and yet hath *jura summi imperii* over his subjects, such was the king of *Scots*, whilst in some times of *Edward I.* and *Edward III.* he was in subjection to the crown of *England*; such was the prince of *Wales* before the conquest thereof by *Edward I.* and the full union of it to the crown of *England*; and thus it was in many investitures made formerly by the kings of *England*: for instance *anno 35 H. 3.* when that king gave to his son *Edward* the principality of *Gascoigne* in *France*, so that the great men of that country *fecerunt ei homagium & fidelitatis juramentum*; yet *Matthew Paris* (*o*) tells us, that *dominus rex tamen sibi retinuit principale dominium, scilicet ligéantiâ.*

The like was done by *E. 3.* when *Rot. Vascon. 36 E. 3. m. 18.* the king had given to the black *Prince* the principality

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(*n*) This exception seems not to relate to the oath, but to the being in a *decenna* or tithing. The whole passage runs thus: " Volons nous, que tres tous ceux de " xiiii ans de fouth nous facent le serment, que ils nous serrount fealx &

" leaux, & que ils ne serrount felons, ne " a felons assentaunts, & volons, que " toutz soient en dizeyne, & plevys par " defeyners, sauve gentz de religion, clers " & chivalers & leurs fitz eynes, & femes." (*o*) p. 845.

of Aquitain with a regal jurisdiction, viz. *merum & mixtum imperium*, so that in relation to the subjects of Aquitain he was in nature of a sovereign; yet the king not only reserved *homagium ligum* to be performed to him by the prince, but also reserved his own sovereignty, viz. *Dominio directo & superioritate nobis semper specialiter reservatis*: by reason whereof the king did not only substitute his delegates or judges *de la sovereignty et de resort* to receive appeals from the prince, as appears by Mr. Selden's *Tit. Honoris, part. 2. cap. 3. §. 4.* but was intitled to a superior alligance of all the subjects of Aquitain: so that here were two alligances; one due to the prince, which was qualified and restrained, *salvâ fide regis*; and the other absolute, which was due to the king as supreme.

Again, when in the year 1170. *Hen. 2.* by consent of parliament (*p*), as it seems, (for otherwise it could not be done) made his eldest son king of England; so that there was *rex pater*, and *rex filius*, yet he reserved to himself the supreme alligance of all his subjects: “ Et in crastino coronationis illius rex pater fecit Willielmum regem Scotorum, & Davidem fratrem suum, & comites, & barones regni devenire homines novi regis, & jurare ei fidelitatem contra omnes homines, salvâ fidelitate suâ;” Quod vide apud Hoveden sub eodem anno (*q*), and the instrument itself at large apud Brompton, p. 1104. (*r*): “ Hæc est conventio & finis, quæ Willielmus rex Scotiæ fecit cum domino suo Henrico rege Angliæ filio Matildis imperatricis, viz. quod dictus Willielmus rex Scotiæ devenit homo ligeus domini regis Angliæ contra omnem hominem de Scotia, & de omnibus terris suis aliis, & fidelitatem ei fecit, ut ligo domino suo, sicut alii homines suo principi facere solent; similiter fecit homagium Henrico filio suo, & fidelitatem, salvâ fidelitate domini regis patris sui, &c. Comites & barones de terrâ regis Scotiæ, de quibus dominus rex Angliæ homagium habere voluerit, facient ei homagium contra omnem hominem, & fidelitatem, ut ligo domino suo, sicut alii homines sui ei facere solent, &”

“ Henrico

(*p*) Hoveden sub anno 1170. Brompton, p. 1061.

(*q*) Et sub anno 1175.

(*r*) Et in libro rubro scaccarii, fol. CLXVI. & Rymer's Fœdera, Vol. I. p. 39. ex magno rotulo penes Camerar'.

“ *Henrico regi filio suo & heredibus suis, salvâ fidelitate do-*
“ *mini regis patris sui.*”

Here was *first* the supreme king, namely *rex pater*, who did not oust himself of his regality, as some have mistaken, but had the sovereignty still, for he reserved his ligeance from the new king, and from all his subjects; yea, and in farther testimony thereof the *rex filius* in the year 1175. did his father lige homage, and swore alligeance *contra omnes homines*, as appears by *Hoveden*. *Secondly*, Here is a subordinate king, *rex filius*, who, tho in relation to his father he was a subject, yet in relation to his subjects, and particularly to the king of *Scots*, was a sovereign. *Thirdly*, Here is yet another subordinate king, *William* the king of *Scots*, who was a sovereign in relation to his subjects; and altho there was an alligeance or *fidelitas ligea* due by the subjects of *Scotland* to their king *William*, yet it was *salvâ fidelitate* to the kings of *England*, father, and son; and tho there was a lige fealty due to *rex filius*, yet it was *salvâ fide regis patris*; but the fidelity or alligeance to the *rex pater* was purely *fidelitas ligea*, for it had no exception.

3. The third observable upon this oath of alligeance is, that it is not only applicable to the politic capacity of the king, but to the person of the king, as well as to his office, or capacity; and for the misapplication of the alligeance to the regal capacity or crown, exclusive of the person of the king, among other things the *Spencers* were banished. *Vide Judicium inde in Veteri Magnâ chartâ & 7 Rep. 11. Calvin's case*, for the oath is to be applied to the person of the king, as well as his crown.

4. That in all oaths of fealty, as likewise in the profession of homage to any inferior or subordinate lord or prince, it must be *salvâ fide & ligeantia domini regis*; and to omit *this saving* is punishable in such lord: see for this the notable record of 6 E. 1. against the bishop of *Exeter*. *Co. Litt. §. 85. (f)*, and it is no more than is used in other kingdoms. *Vide Spelm. in titulo Fidelitas*. The emperor *Frederic Barbarossa* in the year 1152. made a law, that within his empire *in omni sacramento*

cramento fidelitatis imperator nominatim excipiatur, which obtained presently the like observation in all other countries, and accordingly is the *Customs de Normandy, cap. 29. & Glossa 2da. Ibidem.*

5. That, tho there may be due from the same person *subordinate* alligances, which, tho they are not without an exception of the fidelity due to the superior prince, yet are in their kind *sacramenta ligea fidelitatis*, or subordinate alligances, yet there cannot, or at least should not be two or more co-ordinate absolute ligeances by one person to several independent or absolute princes; for that lawful prince, that hath the prior obligation of alligance from his subject, cannot lose that interest without his own consent by his subject's resigning himself to the subjection of another; and hence it is, that the natural-born subject of one prince cannot by swearing alligance to another prince put off or discharge him from that natural alligance; for this natural alligance was intrinsic and primitive, and antecedent to the other, and cannot be devided without the concurrent act of that prince to whom it was first due: indeed the subject of a prince, to whom he owes alligance, may entangle himself by his absolute subjecting himself to another prince, which may bring him into great straits; but he cannot by such a subjection devide the right of subjection and alligance, that he first owd to his lawful prince. (t)

It appears by *Bracton, Lib. V. cap. 24. (u)*, that there were very many, that had been antiently *ad fidem regis Angliæ & Franciæ*, especially before the loss of *Normandy*; such were the *comes marescallus* that usually lived in *England*, and *M. de Feynes manens in Franciâ*, who were *ad fidem utriusque regis*, but they ever orderd their homages and fealties so, that they swore or professed ligeance or lige homage only to one; and the homage they performd to the other was not purely *lige homage*, but rather *feudal*, as shall be shewn more hereafter: and therefore when war happend between the two crowns, reman-

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(t) The case here put by our author is evidently meant of a private subject's swearing alligance to a forein prince, and has no relation to a national with-

drawing alligance from a prince, who has abdicated the throne.

(u) *Traçtat 5. De Exceptionibus.*

neat personaliter quilibet eorum cum eo, cui fecerāt ligeantiam, & faciat servitium debitum ei, cum quo non steterat in personâ; namely the service due from the feud or fee he holds: but this did not always satisfy the prince, cum quo non steterat in personâ, but their possessions were usually seized, and rarely or not without difficulty restored without a capitulation to that purpose between the two crowns. *Vide Claus.* 15 H. 3. m. 21. *pro Henrico de la Vagor*, *Claus.* 20 H. 3. m. 1. *pro Simone Montford*, and *Placita Parl.* 18 E. 1. (x), the petition of the earl of Ewe in France for the castles of Hasting and Tikebull is answered, “*Quandocunque placuerit domino regi Franciæ terras*” “*& tenementa hominibus istius regni restituere, quæ sua fuerunt, in potestate ipsius domini regis, quod ipse dominus rex*” “*Angliæ de castris & terris prædictis prædicto comiti reddendis*” “*faciet, quod de consilio suo viderit esse faciendum.*”

But sometimes it fell out, that the inconsiderateness of persons carried them upon presumptions of some advantages to make a ligeance to both princes; and then the successes of either side rendered them within the penalty of the breach of alligeance to the adverse party.

Peter Brian had the earldom of *Richmond* here in *England*, and held it of the crown of *England*, and the duchy of *Britany* in *France*, which was held of the crown of *France*, (tho' *Brompton* tells us, that by an agreement between *Richard I.* and the king of *France* sub anno 1191. (y), the feigniory thereof was bestowed upon the king of *England*) he was an homager of the crown of *France*, and upon some agreement between him and the king of *England* touching a war with *France*; he came into *England*, and, as it seems, swore fealty to the crown of *England*; but afterwards he fell in again with the king of *France*, and betrayed the army of the king of *England*, and per internuncios reddidit Angliæ regi homagium; but he lost himself with both crowns: the king of *France* disposed of the duchy of *Britany* to his son, and the king of *England* gave the earldom of *Richmond* to *Peter de Sabaudia*; tho' upon an exchange he afterwards took it back, and restored it to a son of the former earl. *M. Paris* sub anno 1234. p. 406:

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and

(x) *Ryley's Plac. Parl.* p. 292

(y) *Vide Brompton*, p. 1196:

and *Claus.* 19 H. 3. m. 17. *dors.* where in a letter by the king to the pope the whole story is related.

After this *John de Breme* otherwise *Montford* descended from the above-mentiond *Peter*, falling in with king *Edward III.* after his assumption of the title of *France*, was restored to the duchy of *Britany* and earldom of *Richmond*; and *Claus.* 19 E. 3. p. 1. m. 14. *dors.* did his lige homage to king *Edward III.* as king of *France* in these words: “ Mon seigneur, jeo vous reconnoisse droiturell roy de France, et a vous, come a mon seignior liege et droiturell roy de France, face mon homage pur le dit dutchy de Bre-taigne, quel jeo claime tener de vous, mon seignior, et de veigne vostre home lige de vie, et de membre, et de ter-rene honor, a vivre et morir countre touts gents.” His son *John de Montford* falling back to the king of *France* lost the earldom of *Richmond* by judgment in parliament 7 R. 2. but enterd *de recordo.* *Rot. Parl.* 14 R. 2. n. 14.

These difficulties besel those, that were *ad fidem utriusque regis*; they were sure to be losers on one side, and sometimes on both sides.

And thus far touching the oath of alligeance or fealty.

II. The second exprefs obligation of the subject to his prince is that of homage.

This, tho it be no oath, but a very solemn profession of duty, yet it hath always fealty performd with it, and after it; for homage draws with it fealty, which in case of simple homage done to a subject is with the same exceptions, as the homage is; but in case of *homagium ligeum* it hath attending upon the performance thereof *fidelitas ligea*, or alligeance.

The kinds of homage are three: 1. *Simple*, as that which is performd to a mere subject by virtue of his tenure. 2. *Homagium ligeum.* 3. *Homagium mixtum.*

1. The simple homage, which is performd barely by reason of tenure, is that, which *Littleton* describes both in the words and ceremonies, *Lib. II. cap. 1. (z)*, wherein always there is an exception of the faith due to the king.

2. *Homagium ligeum* which is thus: “ Jeo deveigne vostre
“ home de ceo jour en avant de vy et membre, et de terrene
“ honor, et a vous ferra foyal et loyal, et foy a vous portera
“ contre tous gents, qe viure poient, ou morier”; this is
the form, that *Fleta* gives *Lib. III. ca. 16. (a)*

The ceremony is the same, when done to the king, as
when it is performd to a mesne lord, only *Rot. Parl. 18 H. 6.*
n. 58. the ceremony of kissing the king was dispensed with
by reason of the danger of contagion in time of plague.

And touching this homage these things are observable:

1. It differs from the oath of alligeance in that, this is
only by a profession; but alligeance is by an oath, tho the
oath of alligeance also accompany it.

2. It differs in this, that, whereas all men above the age
of twelve years are to take the oath of alligeance, whether
they hold land, or not; yet lige homage is not to be per-
formd but by three sorts of persons: 1. Such as hold of the
king by homage, which, tho it be performd in respect of te-
nure, yet it is *homagium ligeum*, because performd to the so-
vereign, and without any exception of the homage due to in-
ferior lords. 2. Such as are dukes, earls, or viscounts, or ba-
rons, tho they hold nothing of the king, yet at the corona-
tion they perform a lige homage; the tenor whereof runs
thus: “ I become your liege man of life and limb, and of
“ earthly worship, and faith and truth I shall bear unto you
“ to live and die against all manner of folk: *so God me help.*”
and then he toucheth the crown, and then toucheth the
ground; *nota*, it refers not to any lands. 3. By prelates, or
bishops; and this not only at the coronation of the king, but
after their election, and before the restitution of their tempo-
ralities. *Vide Statute 25 H. 8. cap. 20.*

Antiently the clergymen quarrelld at the performance of
homage to the prince; but by the constitutions of *Clarendon*
set down by *Matthew Paris*, p. 101. they were bound to per-
form it, and it hath been hitherto practised; only to gratify
them in some thing antiently it was indulged in this manner,
viz. “ *Faciet electus homagium & fidelitatem regi, sicut ligeo*
“ *domino*

“ domino suo, de vitâ, & membris, & de honore terreno, salvo ordine suo, priusquam consecretur” ; and, tho I do not find this *salvo ordine* inserted in after-times, yet there hath been a temperament added to that homage performd by clergymen, which, it seems, satisfied their scruple, their homage running thus: “ I do you homage, and faith, and truth bear unto you, our sovereign lord, and to your heirs kings of England, and I shall do, and truly acknowledge the service of the lands, which I claim to hold of you in the right of the church, as God me help.”

And this is fealty, as well as homage, for it is accompanied with an oath, tho it hath the solemnity of genuflexion, and kissing the king's cheek.

3. The agreements and differences between that homage, that is simply feudal, or by reason of tenure only, and this homage, that is *homagium ligeum*, are these: 1. Because, tho homage is not to be done by any, but those, that hold by that service, or by the nobility, or clergy, as before; yet when done to the king, it becomes *homagium ligeum* in respect of the person to whom it is performd. 2. If it be homage done to the king, it is *homagium ligeum*, and hath no exception of homage due to others. 3. But principally the difference is in the effect of it, which is excellently described by *Terrien* in his Comment upon the *Customs of Normandy*, *Lib. III. cap. 1.* Feudal homage, that is simply such, binds only *ratione feodi*; therefore if the homager alien, or deliver to his lord his fief, or fee, he is discharged of the obligation; but lige homage, tho it may be performd by reason of the fee in its kind or species, yet it principally binds the person; and tho the fief it self be aliened, or transferd to another, yet the obligation of lige homage continues.

3. There are certain homages, that are mixt, and partly lige, and partly not; and they are of two kinds: 1. When the homage is performd to a prince, that is sovereign in relation to his subjects, yet owes a subjection to some other prince; this was the case of the prince of *Wales*, and the king of *Scots* before mentioned, the homage, that they performd to the king of *England*, was simply lige homage, as we may read before and particularly in *Walsingham's Ypodigma Newstric*

sub anno 1291. (b), where the tenor of the homage of *John de Baliol* king of *Scots* is entred in *hæc verba*: “*Domine Ed-
 “ varde rex Angliæ, superior domine regni Scotiæ, ego Johannes
 “ Baliol rex Scotiæ recognosco me hominem vestrum ligeum de
 “ toto regno Scotiæ, & omnibus pertinentiis, & hiis, quæ ad hoc
 “ spectant; quod regnum meum teneo & de jure debeo & cla-
 “ mito tenere hæreditariè de vobis & hæredibus vestris regibus
 “ Angliæ, de vitâ & de membris, & de terreno honore contra
 “ omnes homines, qui possunt vivere & mori.*”

I mention this homage of the king of *Scots*, not to revive the antient controversy touching the subordination of that kingdom to this, for that difference hath been long settled and at peace; but only to apply my instances of the various sorts of homages performd by soveraign princes.

But the homage, that was performd by their subjects to them, was partly lige homage, and partly not; it was lige homage as to between the king of *Scots* and them, and as to all persons in the world, except the king of *England*; for the king of *Scots* and prince of *Wales* had the rights of soveraignty *jura imperii* as in relation to their subjects and all others, but the king of *England*.

But in relation to the king of *England*, the homage performd to the prince of *Wales*, or king of *Scots* was not lige homage; for there was an exception either expressed or implied at least *salvâ fide domini regis Angliæ*, as appears plainly above.

2. Another instance of a mixt homage is, when a soveraign prince hath a vassalage, or possession in another absolute prince's dominion: this was the case of the king of *England*, in relation to the lordships and seignory he had in *France*, as *Aquitaine, Anjou, and Picardy, &c.* which were all held of the crown of *France*: these descended to king *Edward III.* the king of *France* required lige homage from the king of *England* for these territories; the king of *England*, as king of *England*, had no dependence on *France*, and therefore for the more caution performd to the king of *France* for the dutchy of *Aquitaine* and other his possessions in *France* a general ho-

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mage by these words, “ *Nous entromys in l’homage de roy de France per ainsi, come nous et nous predecessors ducs de Guyen estoient jades enterent en l’homage des royes de France pur temps esteant*”; and altho afterwards a settled form of homage was prescribed in this case (c), yet most evident it is, that it was not *homagium ligeum*, but only a *feudal homage* relative to those territories of the crown of *France*, but not at all with any relation to the person or crown of the king of *England*.

For the king of *England* had a double capacity, one as an absolute prince, that owed no subjection to the crown of *France*, nor to any other king, or state in the world; in this capacity he neither did nor could do homage to the king of *France*; he had another capacity, as duke of *Aquitaine*, and in that capacity he owed a *feudal*, but not *personal* subjection to the crown of *France*; and in this latter capacity only, and as a different person from himself, as king of *England*, he did the homage, which was in truth no *lige homage*, but a bare *feudal homage*, which I rather mention to rectify the mistakes of those, that call it a *lige homage*.

But by the way I must observe, this *feudal homage*, as duke of *Aquitain*, lasted not long, for in 14 E. 3. the king of *England* assumed the title of king of *France* together with the arms of *France* by hereditary descent, which style his successors have ever since used.

And indeed the name of *lige homage* from him, that was king of *England*, to the king of *France*, tho purely in the capacity of duke of *Aquitain*, founded so ill, that when a peace was in treaty between the king of *France* and *Richard II.* viz. *Rot. Parl.* 17 R. 2. n. 16. the entry is made, “ *Fait a remember qe le roy, seigneurs, chivalers, et justices assenterent en cest parlement a le pees, purensi qe nostre dit seigneur le roy ne face homage lige, et sauant tous dits le liberty de la person nostre seigneur le roy, et de son royaume de Angleterre et de ses liges du dit royaume*”, and with power to resort to the title of the crown of *France*, in case of breach of league by the king of *France*: this is farther amplified by the speech made openly by the speaker of the house of commons. *Ibid.* n. 17.

The homage here meant was with relation to the duchy of *Aquitain*, which upon this treaty was to be deliverd to the king of *England*.

And thus much touching these two securities of the subject's allegiance to the king of *England*, wherein I have been the larger, because many things occur in this business, that give some light to antiquity, and do not so commonly occur, and because the great brand of high treason is, that it is a violation or breach of that sacred bond from the subject to his king, commonly called allegiance, for the security whereof this oath of allegiance, and lige homage were instituted, and effectually expounds the obligation, and duty of that allegiance, that is due from the subject to the king.

I shall now only mention those two eminent oaths of supremacy, and obedience, tho there were besides them other temporary oaths relating to the crown, as that of 25 *H. 8. cap. 22.* 26 *H. 8. cap. 2.* 28 *H. 8. cap. 7.* 35 *H. 8. cap. 1.*

The supremacy of the crown of *England* in matters ecclesiastical is a most unquestionable right of the crown of *England*, as might be shewn by records of unquestionable truth and authority, but this is not the business of this place; yet nevertheless the pope made great usurpations and incroachments upon the right of the crown herein.

King *Henry VIII.* in the twenty-fifth year of his reign having pared off those incroachments in a good measure by the statute of 25 *H. 8. capp. 19, 20, 21.* in the twenty-sixth year of his reign the supremacy in matters ecclesiastical is rejoind and restored to the crown by the statute of 26 *H. 8. cap. 1.*

The papal incroachments upon the king's sovereignty in causes and over persons ecclesiastical, yea even in matters civil under that loose pretense of *in ordine ad spiritualia*, had obtained a great strength, and long continuance, notwithstanding the security the crown had by the oaths of fealty and allegiance; so that there was a necessity to unrivet those usurpations by substituting by authority of parliament a recognition by oath of the king's supremacy as well in causes ecclesiastical, as civil.

And therefore after those revolutions, that happend in the life, and on the death of *Henry VIII. Edward VI.* and queen *Mary*, queen *Elizabeth* coming to the crown, the oath of supremacy was enacted by the statute of 1 *Eliz. cap. 1.* for the better securing of the supreme authority of the crown of *England* as well in matters ecclesiastical, as temporal; which I shall not here repeat, but reserve the same, and what is proper to be said touching it, to a particular chapter hereafter. (d)

Afterwards the dangerous practices of popish recusants gave the occasions of enacting of the oath of obedience by the statute of 3 *Jac. cap. 4.* which I shall likewise refer to its proper place.

And thus far touching alligance, and the securities of the same by the oath of alligance, and the profession of lige homage.

C H A P. XI.

Concerning treasons at the Common law, and their uncertainty.

HAVING shewn in the former chapter the kinds and bonds of fidelity and alligance from the subject to the king, I come to consider of those crimes, that in a special manner and signally violate that alligance, namely high treason.

At Common law the crime of high treason had some kinds of limits and bounds to it.

In the time of *Henry II. Glanvil*, who then wrote, *Lib. IV. cap. 1 & 7.* tells us of four kinds of *crimina lese majestatis*, viz. *de morte regis, de seditione regni, de seditione exercitus regis*, and the counterfeiting of the great seal; for as to the counterfeiting of money, that came under the title of *Crimen falsi*, and the punishment thereof antiently was various; but of that particular hereafter.

Bracton, that wrote in the time of *Henry III. Lib. III. cap. 3.* “*Siquis ausu temerario machinatus sit in mortem domini regis; vel aliquid egerit, vel agi procuraverit ad seditionem (a) domini regis, vel exercitus sui; vel procurantibus auxilium & consilium præbuerit, vel consensum, licet id, quod in voluntate habuerit, non perduxerit ad effectum*”; to which he adds counterfeiting of the seal and money; which, tho they come under *crimen falsi*, yet are reckond by him among the *crimina lese majestatis*: tho in these old authors treason is sometimes expressed by the name of *sedition*, yet that word is too general and comprehensive of other offenses not capital, as well as of treason; and therefore a charge of sedition against the king, or of exciting sedition, or of speaking, writing, or doing any thing *seditionously*, doth not amount to a charge of treason; and therefore it was, that in the case of *Selden* and others, *Trin. 5 Car. B. R. (b)*, when upon an *habeas corpus* the parties were returned *committed by the privy council by the king's command*

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(a) In the case of *Mr. Selden* this is supposed to be the true reading, but in most of the MSS. of *Bracton* the word in this place is *seditionem*, altho in other places of the same chapter the word *seditio* is used: *Flota* makes frequent use of the word *Seductio*, *Lib. I. cap. 20. §. 1. cap. 21. §§. 1, 2, 3.* (the last of which places seems to be a direct transcript from *Bracton*) tho the word *seditio* is once used by him, *dicto capite, §. 8.* and *Bracton* afterwards in this same chapter styles a traitor *seductor*.

Hengham cap. 2. and *Glanvil, Lib. I. cap. 2.* both of them place *seditionem* in the rank of treasons, and so it was esteemed by the Civil law. *Dig. Lib. XLVIII. tit. 4. ad leg. Jul. Majestatis, l. 1. tit. 19. De Jennis, l. 38. §. 2.* *Seditio* continued to be the technical word

in legal proceedings (as will appear from several records hereafter quoted) until the terms *proditio & proditorie* prevailed in its room, which last word must now be necessarily used in every indictment of treason. *3 Co. Inst. 4, 12, 15.*

(b) *Mich. 5 Car. I. Vide Rusworth's Historical Collections, Vol. I. p. 679. Appendix p. 18, &c. Seldeni Opera, Vol. VI. p. 1938.* The court was content, that they should be bailed, but said, that they ought to find sureties also for their good behaviour: they had their sureties ready for the bail, but they were remanded to the *Tower*, because they would not find sureties for the good behaviour. *Selden* was not bailed till *May 1631.* and not discharged from his bail till *January 1634. Vindicie Maris Clausi. Seldeni Opera, Vol. IV. p. 1427, &c.*

command for stirring up sedition against the king, the prisoners were bailed in the king's court, because it amounted not to a charge of treason, for sedition in a true legal signification doth not import treason.

Fleta, who wrote in the time of Edward I. agrees almost *verbatim* with *Bracton*, viz. *Lib. I. cap. 20, 21.* (c)

Britton, who made his book in the time also of king Edward I. reckons up treasons much in the same manner, yet makes some additions, *cap. 8. de treson*; “Grand treson est
“ a compasser nostre mort, ou disheriter nous de nostre royalme,
“ ou de fauser nostre seal, ou de countrefaire nostre monoye, ou
“ de le retoundre.”

And *cap. 22. de appeles*: “Sont ascunes felonies, que touchent
“ nostre suyt, et poient estre suys pur nous, sicome de vers nos
“ mortels enemies, de nostre seal, de nostre corone, et de nostre
“ monoye fause.”

Again; “En primes, c'est a dire, de appels de felonies, que
“ poient estre faitz par nous, et nemye pour nous, sicome de tre-
“ son, et de compassement purveu vers nostre persone pour nous
“ mettre a mort, ou nostre compayne, ou nostre pere, ou nostre
“ mere, ou nos enfauntz, ou nous disheriter de nostre royalme,
“ ou de trahir nostre hôte, tout ne soit tiel compassement mys
“ en effect.”

And in the later end of the same chapter, “Et de
“ fausyn de nostre seal, & de nostre monoye, purra lensuer ap-
“ pels pour nous en mesme la manere, et ausi del purgiser de no-
“ stre compayne. ou de nos filles, ou des norices de nos enfauntz:
“ (d) En queux cases soit le jugement, de estre treyne, et pen-
“ du,

(c) He does not rank the counterfeit-
ing of the seal or of the coin among the
crimina lese majestatis, (as *Bracton*
does) but among the *crimina falsi*, *Lib. I.*
cap. 22.

(d) According to the *Mirror of Justices*,
p. 21, 22. high treason is committed,
1. *Per ceux, que occident le roy, ou*
compassent de faire. 2. *Per ceux, que*
luy disheritent del royalme, per [ceux que]
trahissent un host, ou compassent de le
faire. 3. *Per ceux avorterors, que spar-*
gissent le femme le roy, le file le roy cig-

nesse legitime, avant ceo que elle soit ma-
ry, en la garde le roy, ou la nurice le
ant le heire le roy.—These are the
only offenses, which that treatise calls
Crimes de Majesty. Counterfeiting of the
king's seal or money is ranked under
Fausonnery, *p. 29.* And every species of
petit treason is styled *Treason*, *p. 30.* as it
is also by *Britton*, *cap. 8.*

It is one of the articles against *Roger*
Mortimer, *Rot. Parl. 4 E. 3. n. 1. 28*
E. 3. n. 8. that he compassed to destroy
les nurriz le roy. If a private lord was
injured

“ *du, &c.*” By these various expressions of *Briton* it appears, that the crime of high treason was very uncertain; sometimes styled under the name of felony, sometimes had the punishment of petit treason applied to the crime of high treason, and some crimes mentiond, as treasons, which were not so taken by *Bracton*, or *Fleta*; and indeed in the farther pursuit of this argument we shall find, that at common law there was a great latitude used in raising of offenses into the crime and punishment of treason, by way of interpretation and arbitrary construction, which brought in great inconvenience and uncertainty.

In the parliament of 33 E. 1. now printed (e), which is likewise entred P. 33 E. 1. Rot. 22. North't. coram rege: “ *Nicholaus de Segrave* was impeached (f) *de eo, quod cum dominus rex nunc in ultimâ guerrâ suâ Scotiæ inter hostes & inimicos suos extitisset, & idem Nicholaus de Segrave homo ligens tenens de ipso domino rege per homagium & fidelitatem in eadem guerra in exercitu & auxilio ipsius commorans esset; idem Nicholaus de Segrave motu proprio, malitiosè, & absque causâ contentionem & discordiam versus Johannem de Crumbwell in eodem exercitu similiter in auxilium regis existentem movebat,*” laying great iniquities to his charge; that *Crumbwell* offered to defend himself against these imputations, as the king’s court should award: *Et ad hoc fidem suam ei dedit; et post ejusdem fidei dationem prædictus Nicholaus elongando se & suos, & extrahendo prædictum Johannem & suos ab exercitu & auxilio ipsius domini regis, quantum in ipso Nicholaus fuit, eundem dominum regem inter inimicos suos periculo hostium suorum relinquendo sprexit, & prædictum Johannem ad se defendendum in curia regis Franciæ adjornavit, & certum diem ei dedit; et sic, quantum in eo fuit, submittens & subjiciens dominium regis & regni Angliæ subjectioni domini regis Franciæ; and that in pursuance thereof contrary to the king’s prohibition he took his journey towards*

injured in this manner, it was antiently petit treason: “ *Traditores autem, qui dominum, dominamve interfecerunt, vel qui cum uxoribus dominorum suorum, vel filiabus, vel nutricibus dominorum concubuerint*”, &c. *Fleta, Lib. I. cap. 37. §. 4.* “ *Ou disparage ma file, ou m*

“ *chambre, ou ma femme, ou la norrice de mon beire, ou le aunt, &c.*” *Mirror de Justice, p. 31. Vide Briton, cap. 22. (70.)*

(e) *In Ryley’s Placita Parliamentaria, p. 266.*

(f) *Per Nicholaum de Warwick, qui sequitur pro domino rege.*

towards *France*; and that he did this “*nequiter & malitiose*”
 “*in personæ domini regis periculum, curiæ suæ contemptum, co-*”
 “*ronæ & dignitatis suæ regiæ lesionem & exheredationem ma-*”
 “*nifestam, & contra ligeantiam, homagium, juramentum, & fi-*”
 “*delitatem, quibus ipse domino regi tenebatur.*” *Segrave* con-
 fessed the offense. The lords in parliament are charged by
 the king upon their alligance to give advice, what punish-
 ment was to be inflicted; “*Qui omnes habito super hoc dili-*”
 “*genti tractatu & advisamento, consideratis & intellectis omni-*”
 “*bus in dicto facto contentis & per prædictum Nicholaum plene*”
 “*& expresse cognitis, dicunt, quod crimen hujusmodi meretur*”
 “*pœnam amissionis vitæ, &c.*” but he was after pardoned.

Which judgment seems to import no less, than the crime
 of high treason, tho the whole judgment be not declared at
 large but with an *&c.*

Accroaching of royal power was a usual charge of high
 treason antiently, tho a very uncertain charge, that no man
 could well tell, what it was, nor what defense to make
 to it.

The great charge against the *Spencers* about the 1 *E. 2.*
 was, that they did accroach royal power, whereof several in-
 stances are given. (*g*)

The great charge against *Roger Mortimer* in the parliament
 of 4 *E. 3.* next to that of the procurement of king *Ed-*
ward II.'s death, was accroaching of royal power, whereof se-
 veral instances are given; but he had judgment by the lords
 in parliament to be drawn and hanged, upon that article on-
 ly, that concerned the death of king *Edward II.* *Vide infra*
cap. 14.

Trin. 21 E. 3. Rot. 23. rex coram rege. John Gerberge, Knt.
 indicted, “*Quod ipse simul cum aliis in campo ville de Royston*”
 “*in altâ regiâ stratâ*”, rode armed with his sword drawn in his
 hand *modo guerrino*, and assaulted and took *William de Bote-*
lisford, and detained him, till he paid 90 *l. &c.* and took
 away his horse, “*usurpando sibi infra regnum regis regiam po-*”
 “*testatem ipso domino rege in partibus exteris existente, contra*”
 “*sui ligeantiam, & regis & coronæ suæ præjudicium, & sedi-*”
 “*tionem*”

“*tionem manifestam*”: he prayed his clergy, but was ousted of it, *Quia privilegium clericale in hujusmodi casu seditionis secundum legem & consuetudinem regni hætenus obtentas & usitatas non est allocandum* (b): but yet he refusing to plead was not convicted, as in case of treason, but was put to penance *ad pœnitentiam suam*; two of his companions being convicted by verdict, had judgment, *quod distrabantur & suspendantur*.

This judgment it seems troubled the commons in parliament, who thought, that the accroaching of royal power was somewhat too general a charge of treason before the ordinary courts of justice, tho it had been used in charges of treason in parliament; and therefore in the parliament following held *Craftino Hilarii 21 E. 3. n. 15.* there is a petition in parliament in these words: *Item prie le comen, qe come ascuns des justices en place devant eux ore de novel ont adjudges pur treason accroachment de royal poer, pry le dit comen, que le point soit desclare en ceo parlement, en quele case ils accrochent royal poer, per quei les seigneurs perdent lour profit de le forfeiture de lour tenents, et les arreynes benefice de seint esglise.*

Ro'. En les case, ou tiel judgments sont rendus, sont les points des tieux treasons et accrochments declares per mesmes les judgments.

In 22 *Aff. 49. (i)*, it appears, that *John at Hill* was indicted, and attaint of high treason for the death of *Adam de Walton nuntii domini regis missi in mandatum ejus exequendum*.

And in the year before, *viz. 21 E. 3. 23.* it seems admitted, that an appeal of treason lies for the killing one of malice prepense, that was sent in aid of the king in his wars with certain men of arms.

King *Edward II.* being deposed, and committed prisoner to *Barclay* castle, under the custody of *John Matravers* and *Thomas Gurney*, was there by the procurement of *Roger Mortimer* barbarously murdered; for which *Mortimer* and *Gurney* were attainted of treason by judgment of the lords in parliament. *4 E. 3. n. 1, 5. (k)*

Y

Matra-

(b) For the same reason clergy was refused in *Thorpe's* case, *T. 21 E. 3. Rot. 23. Rex. de quo vide postea.*

(i) *B. Treason 14.*

(k) *Vide Rot. Parl. 28 E. 3. n. 8.* when the judgment against *Mortimer* was reversed.

Matravers was suspected to be guilty, but yet he played another game, for tho he knew of the death of *Edward II.* yet he informed *Edmund* earl of *Kent*, half-brother to *Edward II.* that he was living; the earl therefore with many others raised a force for his deliverance, but prevailed not, but was for that fact attainted of treason, *anno 3 E. 3.* which attainder was afterwards in the parliament *28 E. 3.* reversed, and the grand-child of the earl of *Kent* restored (1): *John Matravers*, who it seems had animated the insurrection of the earl of *Kent*, tho he fled into *Germany*, yet by judgment of the lords in parliament *4 E. 3. n. 3.* was attainted of treason for the death of the earl of *Kent*: the words of the record are, “ *Tres-touts les peres, counts, et barons assembles a cest parlement a Westminster si ont examine estraitment, et sur ce sont assentus et accordes, qe John Matravers si est culpable de la mort Esmont count de Kent le uncle nostre seigneur le roy qe ore est, come celui qe principalement, trayterousment et fausement la mort le dit counte compassa issint, qe la ou le dit John savoit la mort le roy Edward, ne pur quant le dit John par enginous manner et par ses fausses et mauveyse subtilties fist le dit counte intendre la vye le roy, le quel fausse compassement fust cause de la mort le dit counte et de tout le mal qe s’ensuist, par quoi les sus-dits peres de la tre et jugges du parlement auggent et agardent, qe le dit John soit treine, pendus, et decolle, come treitre, queu part, qil soit estre troue.*”

Upon this judgment *Matravers* brought a petition of reversal. *Rot. Parl. 21 E. 3. n. 65. dors.* but nothing was done upon it; but *Rot. Parl. 25 E. 3. p. 2. n. 54, 55.* he was restored by act of parliament.

By these, and the like instances, that might be given, it appears, how uncertain and arbitrary the crime of treason was before the statute of *25 E. 3.* whereby it came to pass, that almost every offense, that was, or seemd to be a breach of the faith and alligance due to the king, was by construction and consequence and interpretation raised into the offense of high treason. And

(1) That attainder was reversed long before, viz. *4 E. 3. Vide Rot. Parl. 4 E. 3. n. 11, 12.* upon the petition of *Edmund* his eldest son, and *Margaret* countess dowager of *Kent*; and *Edmund* the son was restored.

And we need no greater instance of this multiplication of constructive treasons, than the troublesome reign of king Richard II. which, tho it were after the limitation of treasons by the statute of 25 E. 3. yet things were so carried by factions and parties in this king's reign, that this statute was little observed; but as this, or the other party prevailed, so the crimes of high treason were in a manner arbitrarily imposed and adjudged to the disadvantage of that party, that was intended to be suppressed; so that *de facto* that king's reign gives us as various instances of these arbitrary determinations of treasons, and the great inconveniences that arose thereby, as if indeed the statute of 25 E. 3. had not been made or in force. And tho most of those judgments and declarations were made in parliament (*); sometimes by the king, lords, and commons; sometimes by the lords, and afterwards affirmed and enacted, as laws; sometimes by a plenipotentiary power committed by acts of parliament to particular lords and others, yet the inconvenience, that grew thereby, and the great uncertainty, that happened from the same, was exceedingly pernicious to the king and his kingdom.

I shall give but some instances. *Rot. Parl. 3. R. 2. n. 18.* John Imperial, a public minister, came into the kingdom by the safe conduct of the king, and he was here murdered (m); and an indictment taken by the coroner upon the view of his body, "*Quel case examine et dispute entre les seigneurs et commons, et puis monstre au roy en plein parlement, estoit illoques devant nostre dit seigneur le roy declare, determine, et assentus, qe tiel fait et coupe est treason, et crime de royal majesty blemy, en quel case y ne doet allouer a nulli de enjoyer privilege de clergy.*" (n)

This declaration, it is true, was made and grafted upon the clause in the latter end of the statute of 25 E. 3. touching declaring of treasons by parliament.

In the parliament of 10 R. 2. there was a large commission (o) granted by the king upon the importunity of certain

4

great

(*) This was the reason why the statute of 25 E. 3. was not followed, because that statute was not thought to limit declarations in parliament.

(m) *Holin. Chron. p. 422. 60. b.*

(n) See 3 *Co. Instit. 8.*

(o) See this commission 10 R. 2. *cap. 1.* and *State Trials, Vol. 1. p. 3.*

great lords, and of the commons in parliament, to the archbishop of *Canterbury* and others for the reformation of many things supposed to be amiss in the government; which commission was thought to be prejudicial to the king's prerogative. *Vide Rot. Parl. 10 R. 2. n. 34. Rot. Parl. 21 R. 2. n. 11.*

After this, *viz. 25 Aug. 11 R. 2.* the king called together the two chief justices, and divers others of the judges, and propounded divers questions touching the proceeding in that parliament, and the obtaining of that commission; and they gave many liberal answers, and among the rest, "*Qualem pœ-*
"*nam merentur, qui compulerunt sive arctârunt regem ad con-*
"*sentiendum confectiõni dictorum statuti, ordinationis, & com-*
"*missionis? Ad quam questionem unanimiter responderunt, quod*
"*sunt, ut proditores, merito puniendi: Item qualiter sunt illi*
"*puniendi, qui impediuerunt regem, quo minus poterat exercere,*
"*que ad regalia & prærogativam suam pertinuerunt? Unani-*
"*miter etiam responderunt, quod sunt, ut proditores, etiam pu-*
"*niendi*", with divers other questions, and answers to the like purpose. (*p*)

This extravagant, as well as extrajudicial declaration of treason by these judges, gave presently an universal offense to the kingdom; for presently it bred a great insecurity to all persons, and the next parliament *crastino purificationis 11 R. 2.* there were divers appeals of treasons by certain lords appellors, wherein many were convicted of high treason under general words of *accroaching royal power, subverting the realm, &c.* and among the rest those very judges, that had thus liberally and arbitrarily expounded treason in answer to the king's questions, were for that very cause adjudged guilty of high treason, and had judgment to be hanged, drawn, and quartered, tho the execution was spared (*q*); and they having led the way by an arbitrary construction of treason not within the statute, they fell under the same fate by the like arbitrary construction of the crime of treason.

4

Neither

(*p*) See the questions and answers. *land except Tresilian, who was executed according to the judgment. See State*
State Trials, Vol. I. p. 8.

(*q*) They were all banished to Ire- *Trials, Vol. I. p. 13, 14.*

Neither did it rest here, for the tide turned, and in *Rot. Parl.* 21 R. 2. n. 12, 13. the commission before-mentioned, and the whole parliament of 11 R. 2. is repealed, and a new appeal of treason against the duke of Gloucester, earl of Arundel, and the commissioners in the former commission, and the procurers thereof under that common style of *accroaching royal power*, whereupon divers of them were condemned, as traitors: and n. 18. there were four points of treason farther declared, *viz.* “ *Chescun qe compasse, et purpose la mort le*
“ *roy, ou de lui deposer, ou de susrendre son homage liege, ou*
“ *celuy, qe levy le people, et chivache encountre le roy a faire*
“ *guerre deins son realme, et de ceo soit dument atteint, et ad-*
“ *jugge en parlement, soit adjudgez come traytor de haut trea-*
“ *son encountre la corone, et forfeit de lui, et de ses heyres,*
“ *qecunques tous ses terres, tenements, te possessions, et libertys, et*
“ *touts autres inheritements, qeux il ad, ou ascun autre a son*
“ *oeys, ou avoit le jour de treason perpetres, si bien en fee tayl,*
“ *come de fee simple, au roy.*

These four points of treason seem to be included within the statute of 25 E. 3. as to the matter of them, as shall be hereafter shewed; but with these differences, *viz.* 1. the forfeiture is extended farther than it was formerly, namely to the forfeiture of estates-tail and uses. 2. Whereas the ancient way of proceeding against commoners was by indictment, and trial thereupon by the country, the trial and judgment is here appointed to be in parliament. 3. But that, wherein the principal inconvenience of this act lay, was this, that whereas the statute of 25 E. 3. required an overt-act to be laid in the indictment, and proved in evidence, this act hath no such provision, which left a great latitude, and uncertainty in point of treason, and without any open evidence, that could fall under human cognizance, subjected men to the great punishment of treason for their very thoughts, which without an overt-act to manifest them are not triable but by God alone.

These were the unhappy effects of the breaking of this great boundary of treason, and letting in of constructive treasons, which by various vicissitudes and revolutions mischieved

all parties first or last, and left a great unquietness, and unsettledness in the minds of people, and was one of the occasions of the unhappiness of that king.

Henry IV. usurping the crown, and the people being sufficiently sensible of the great mischiefs, they were brought in by these constructive treasons, and the great insecurity thereby. *Rot. Parl. 1 H. 4. n. 70.* the parliament of 21 R. 2. is entirely repealed, that of 11 R. 2. entirely revived; and it was enacted (*r*), that a parliamentary authority be not for the future lodged in a committee of particular persons, as it was done 21 R. 2. “ *Et auxint mesme nostre seigneur le roy de son propre motif rechercheant, qe come in le dit parlement tenuz l’an 21. y fueront ordeynes per estatute plusieurs pains de treason, si qe y ne avoit ascun home, qe sauoit, come il se deust savoir, de faire, parler, ou dire pur doubt des tielx pains, dist, qe sa volunte est tout outrement, qe en nul temps avener ascun trayson soit adjudges autrement qil ne feust ordeignez par statute en temps de son noble aiel le roy E. le 3. qe dieu assoyl; dont les dits seigneurs et comens fuerent tres grandment rejoyces, et mult humblement ent remercièrent nostre dit seigneur le roy.*” (*f*)

Now altho the crime of high treason is the greatest crime against faith, duty, and human society, and brings with it the greatest and most fatal dangers to the government, peace, and happiness of a kingdom, or state, and therefore is deservedly branded with the highest ignominy, and subjected to the greatest penalties, that the law can inflict; yet by these instances, and more of this kind, that might be given, it appears, 1. How necessary it was, that there should be some fixed and settled boundary for this great crime of treason, and of what great importance the statute of 25 E. 3. was, in order to that end. 2. How dangerous it is to depart from the letter of that statute, and to multiply and inhanse crimes into treason by ambiguous and general words, as *accroaching of royal power, subverting of fundamental laws*, and the like; and 3. How dangerous it is by construction and analogy to make treasons, where the letter of the law has not

2

done

(*r*) See 1 H. 4. cap. 3, 4 & 5.

(*f*) See 1 H. 4. cap. 10.

done it : for such a method admits of no limits or bounds, but runs as far as the wit and invention of accusers, and the odiousness and detestation of persons accused will carry men. (t)

C H A P. XII.

Touching the statute of 25 E. 3. and the high treasons therein declared.

A Parliament was held on *Wednesday* on the feast of *St. Hill*. 25 E. 3. at which parliament the statute declaring the points of treason was made. The petition of the commons, upon which it was made, is *Rot. Parl. 25 E. 3. p. 2. n. 17.* in these words: “ Item come les justices nostre seigneur le
“ roy assignes en diverses countees ajuggent les gents, qe font
“ empeches devant eux, come treitours par divers causes dis-
“ conus a la comen estre treison, qe plese a nostre seigneur
“ le roy par son counsel, & par les graunts & sages de la
“ terre declarer les points de treson en cest present parle-
“ ment.

“ Ro'. Quant a la petition touchant treison nostre seigneur
“ le roy ad fait declarer les articles de ycele en manner qe
“ ensuit : cest assavoir, en case quant home face compasser
“ ou ymaginer la mort nostre seigneur le roy, ou madame sa
“ compaignie, ou de lour fitz primer & heir ; ou si home
“ violaist la compaignie le roi, & la eifne fille le roy nient
“ marié, & la compaignie a leisne fitz & heire du roi ; & si
“ home leve de guerre contre nostre seigneur le roy en son
“ royaume ; ou soit adhereant as enemies nostre seigneur le
“ roy en le royaume, donant a eux eide, & confort en son
“ royaume ou par aillours, & de ceo provablement soit at-
“ teint

(t) This reasoning of our author is equally strong against constructive interpretations of *compassing the death of the king.*

“ teint de overt fait par gents de lour condicion: Et si home
 “ contreface le grant seale le roy, ou sa monoie, & si home
 “ apporte fausse monoie en cest royaume contrefait a la mo-
 “ noie dengleterre, si come la monoie appallee *Luffeburgh*, ou
 “ autre semblable a la dite monoie dengleterre, sachant la
 “ monoie estre fausse, pur marchander ou paiement faire en
 “ deceit nostre seigneur le roy & de son peuple: Et si home
 “ tuast chancellor, treasurer, ou justice nostre seigneur le roi
 “ del un baunk, ou del autre, justice en eir, des assisez &
 “ de touz auters justices assignez a oyer & terminer, esteantz
 “ en lour places enfesant lour office. Et fait a entendre que
 “ en les cas susnommes doit estre ajuggee treisonce, que estent
 “ a nostre seigneur le roi & a sa royale majeste, & de tiels
 “ maneres de treison la forfeiture des escheets appartient a
 “ nostre seigneur le roy, sibien des terres, & tenementz tenuz
 “ des auters, come de lui mesme: ouesque ceo il y ad autre
 “ manere de treison, cest assavoir, quant un servant tue son
 “ mestre, une feme, que tue son baron, quant home secular
 “ ou de religion tue son prelate, a qi il doit foi & obedi-
 “ ence, & tiel manere de treison doun forfeiture des escheets
 “ a chescun seigneur de son fee propre; & pur ceo que plu-
 “ sours autres cas de semblable treison purront eschaier en
 “ temps avenir, queux home ne purra penser ne declarer en
 “ present, assentu est que qui autre cas suppose treison, que
 “ nest especifietz peramont, aviegne de novel devant ascuns
 “ justices, demoerge la justice sanz aler a juggement de
 “ treison, tantque per devant nostre seigneur le roy & son
 “ parlement soit le case monstre, & declare, le quel ceo doit
 “ estre ajugge treson, ou aut’ felonie; & si par cas ascun
 “ home de cest royaume chivache armee descovert, ou secret-
 “ ment ad gentz armez contre ascun autre pur lui tuer ou
 “ desrobber, ou pur lui prendre & retenir tanque il face
 “ fyn ou raunceon pur sa deliverance avoir, nest pas lentent
 “ du roy & du son conseil, que en tiel cas soit ajugge trei-
 “ son, einz soit ajugge felonie, ou trespass solonc la ley de la
 “ terre auncienement usee, & solonc ceo que le cas demand:
 “ Et si en tiel cas, ou autre semblable devant ces heures as-
 “ cun justice eit ajugge treison, & par ycelle cause les terres

“ & tenementz devenuz en la maine nostre seigneur le roi come
 “ forfaitz eient les cheifes seignours de fee lour escheets des te-
 “ nementz de eux tenuz, le quel que les tenementz soient en la
 “ maine le roi ou en main dauters par doun, ou en autre ma-
 “ nere: savant toutes foits a nostre seigneur le roi lan, & le
 “ waft, & auters forfeitures des chatelx, que a lui attient en les
 “ cas susnommez, & que briefs de *scire faciās* vers les terre-te-
 “ nants soient grantez en tiel cas sanz autre original & sanz
 “ alouer la protection nostre seigneur le roi en la dite suyte;
 “ & de les terres, que sont in la maine le roi, soient grantes
 “ briefs as viscontz des countees la, ou les terres seront, de
 “ ouster la maine sanz autre delaie.”

The statute itself is drawn up upon this petition and answer, and differs nothing in substance from the answer to the petition upon the parliament-roll: the statute itself runs in these words; “ *Item*, whereas divers opinions have been be-
 “ fore this time in what case treason shall be said, and in
 “ what not, the king at the request of the lords and of the
 “ commons hath made a declaration in the manner, as here-
 “ after followeth; that is to say, when a man doth compass
 “ or imagine the death of our lord the king, or our lady his
 “ queen, or of their eldest son and heir; or if a man do
 “ violate the king’s companion, or the king’s eldest daughter
 “ unmarried, or the wife of the king’s eldest son and heir;
 “ or if a man do levy war against our lord the king in his
 “ realm, or be adherent to the king’s enemies in his realm,
 “ giving to them aid and comfort in the realm or elsewhere,
 “ and thereof be provably (a) attainted of open deed by
 “ the people of their condition; and if a man counterfeit the
 “ king’s great or privy seal, or his money; and if a man bring
 “ false money into this realm counterfeit to the money of *Eng-*
 “ *land*, as the money called *Lusburgh*, or other like to the said
 “ money of *England*, knowing the money to be false, to mer-
 “ chandize or make payment in deceit of our lord the king
 “ and of his people: and if a man slay the chancellor, treasurer,
 “ or the king’s justices of the one bench or the other, justices
 “ in eyre, or justices of assize, and all other justices assigned

A a

“ to

(a) See 3 *Co. Instit.* p. 12.

“ to hear and determine, being in their places doing their
 “ offices. And it is to be understood, that in the cases a-
 “ bove rehearsed that ought to be judged treason, which
 “ extends to our lord the king and his royal majesty, and
 “ of such treason the forfeiture of the escheats pertaineth to
 “ our lord the king, as well of the lands and tenements holden
 “ of others, as of himself: and moreover there is another man-
 “ ner of treason, that is to say, when a servant slayeth his
 “ master, or a wife her husband, or when a man secular, or
 “ religious, slayeth his prelate, to whom he oweth faith and
 “ obedience; and of such treason the escheats ought to per-
 “ tain to every lord of his own fee: and because that many
 “ other like cases of treason may happen in time to come,
 “ which a man cannot think nor declare at this present time,
 “ it is accorded, that if any other case supposed treason,
 “ which is not above specified, doth happen before any ju-
 “ stices, the justices shall tarry without any going to judg-
 “ ment of the treason, till the cause be shewed and de-
 “ clared before the king and his parliament, whether it ought
 “ to be judged treason, or other (*b*) felony: and if *par case*
 “ any man of this realm ride armed covertly, or secretly
 “ with men of arms against any other to slay him, or rob
 “ him, or take him, or retain him, till he hath made fine
 “ or ransom for to have his deliverance, it is not the mind of
 “ the king, nor his council, that in such case it shall be
 “ judged treason, but shall be judged felony, or trespass ac-
 “ cording to the laws of the land of old time used, and ac-
 “ cording as the case requireth. And if in such case, or
 “ other like, before this time any justices have judged trea-
 “ son, and for this cause the lands and tenements have
 “ come into the king’s hands as forfeit, the chief lords of the
 “ fee shall have the escheats of the tenements holden of
 “ them, whether that the same tenements be in the king’s
 “ hands, or in others by gift, or in other manner; saving
 “ always to our lord the king the year and the waft,
 “ and the forfeitures of chattles, which pertain to him in
 “ the

(*b*) The old translation seems here ing abbreviated may be either *autre* or to be preferable, *viz. else*; for *aut* be. *antrement*.

“ the cases above-named ; and that writs of *scire faciās*
“ be granted in such case against the land-tenants without
“ other original, and without allowing any protection in the
“ said suit ; and that of the lands, which be in the king’s
“ hands, writs be granted to the sheriffs of the counties,
“ where the lands be, to deliver them out of the king’s
“ hands without delay.”

The several high treasons hereby declared are these :

1. The compassing of the death of the king, queen, or prince, and declaring the same by an overt-act.
2. The violation or carnal knowledge of the king’s comfort, the king’s eldest daughter unmarried, or the prince’s wife.
3. The levying of war against the king.
4. The adhering to the king’s enemies within the land or without, and declaring the same by some overt-act.
5. The counterfeiting of the great seal or privy seal.
6. The counterfeiting of the king’s coin, or bringing counterfeit coin into this realm.
7. The killing of the chancellor, treasurer, justices of the one bench or the other, justices in eyre, justices of assize, justices of *oyer* and *terminer* in their places doing their offices.

C H A P. XIII.

Touching high treason in compassing the death of the king, queen or prince.

THE first article of high treason declared by the statute of 25 E. 3. is this, and in these words :

“ *When a man doth compass or imagine the death of our lord
“ the king, or of our lady the queen, or of their eldest son and
“ heir.*”

Upon

Upon this division there will be these considerations.

- I. What shall be said *a man that compasseth.*
- II. What shall be said the *king, queen, or their eldest son.*
- III. What shall be said *a compassing or imagining of any of their deaths.*
- IV. What shall be evidence, or an *overt-act* to prove such imagining.
- V. The form of an indictment of compassing the death of the king, queen, or prince.

I. What shall be said *a man compassing, &c.*

The general learning of this point in relation to natural, accidental, or civil incapacities hath been at large handled in the former chapters; but there is something peculiar to the case of high treason, which is considerable in this division.

If an *alien amy* comes into *England*, and here compass the death of the king, queen, or prince, this is a man compassing within this law; for, tho he be the natural subject of another prince, yet during his residence here he owes a local alligiance to the king of *England*, and tho the indictment shall not style him *naturalis subditus*, nor style the king *naturalem dominum*, yet it shall run *proditoricè & contra ligeantie sue debitum*. *Co. P. C. p. 5. 7 Rep. Calvin's case. (a). Dyer 144.*

If an *alien amy* subject of another prince comes into this kingdom and here settles his abode, and afterwards war is proclaimed between the two kings, and yet the alien continues here and takes the benefit of the king's laws and protection, and yet compasses the death of the king, this is a man compassing within this law; for, tho he be the natural subject of another prince, he shall be dealt with as an *English* subject in this case, unless he first openly remove himself from the king's protection by passing to the other prince, or by a public renunciation of the king of *England's* protection, which hath some analogy with that, which they call *diffidatio*, or defiance.

And the same law I take to be, if the subject of a foreign prince in war with ours come into *England* and here trade

and inhabit either as a merchant, dweller, or sojourner, if such a person compass the death of the king, he may be dealt with as a traitor, because he comes not hither as an enemy, or by way of hostility, but partakes of the king's protection: with this agrees the case of *Stephano Farrara de Gama*, and *Emanuel Lewes Tinoco*, Portugueze born, and then subjects to the king of *Spain*, between whom and the queen of *England* there was then open war, who were indicted and attaint of high treason for conspiring with *Dr. Lopez* to poison the queen (b). 37 Eliz. *Calvin's case*. 7 Co. Rep. p. 6.

And, tho they came hither with the queen's protection, it alters not the case, for every foreigner living publicly and trading here is under the king's protection: and this appears by the statute of *Magna Charta*, cap. 30. "Et si sint de terrâ
" contra nos guerrinâ, & tales inveniantur in terrâ nostrâ in
" principio guerra, attachientur sine damno corporum suorum vel
" rerum, donec sciatur a nobis vel a capitali justiciario nostro,
" quomodo mercatores terræ nostræ tractentur, qui tunc invenian-
" tur in terrâ illâ contra nos guerrinâ; & si nostri salvi sint ibi,
" alii salvi sint in terrâ nostrâ."

The statute speaks indeed of *mercatores*, but under that name all foreigners living or trading here are comprised.

And therefore in antient times before the subjects of forein princes in hostility residing here were dealt with as enemies, a proclamation issued for their avoidance out of the kingdom; and in default of their avoidance within the time limited by such proclamation they lost the benefit of the king's protection.

And after such proclamation, yet upon caution given sometimes by mainprise *de se bene gerendo*, sometimes by oaths of fidelity to the king, they had sometimes special, and oftentimes general protections, notwithstanding such hostility. *Rot. Vascon.* 18 E. 2. 21, 24. *Pat.* 14 H. 6. part. 2. m. 34, 35.

The statute of the *Staple* (c), cap. 17. hath made provision for merchants strangers, in case war shall happen between their prince and the king of *England*, viz. that they shall have convenient warning by forty days by proclamation

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(b) Vide *Camdeni Eliz. sub anno 1594.*

(c) 27 E. 3.

to avoid the realm; and if they cannot do it by that time by reason of some accident, they shall have forty days more; and in the mean time liberty to sell their merchandizes: during these eighty days they have the king's protection, and if they do any treasonable act above-mentioned, they shall be indicted of treason, notwithstanding the hostility between their sovereign and the king of *England*; but it seems, that if he remain here in a way of trade after proclamation so made, and the time of his demurrage allowed by this act, he may be dealt with as an alien enemy; but yet if he after that time continues in his way of trade or living as before, and shall then conspire the king's death, &c. the king may deal with him as an alien enemy by the law of nations, or as a traitor by the law of the land; because *de facto* he continues as a subject, and under the benefit *de facto* of the king's protection.

Therefore the general words in *Co. P. C. p. 5.* wherein he supposeth an alien enemy cannot be guilty of treason, but must be dealt with by martial law, are to be taken with that allay, that is given in *Calvin's case, fol. 6. b.* in these words: "But if an alien enemy come to invade this realm, and be taken in war, he cannot be indicted of treason, for the indictment cannot conclude *contra ligeantiæ suæ debitum*": the like may be said of such as are sent over merely as spies by a foreign prince in hostility; but an alien enemy living here in the condition of an inhabitant or trader may be guilty of treason as well as an alien *amy*, for he doth it *proditorie* and treacherously, and against the obligation that lies upon him, as well as any others, to be true to the prince, the benefit of whose laws and protection he holds, so long as he is under the same.

But yet this is observable upon the statute of *Magna Charta, cap. 30.* and what hath been before said, 1. That if an alien enemy comes into *England* after the war begun, and lives here under the king's protection as a subject, yet if he practise treason against the king during such his abode here, he may be indicted of high treason *contra ligeantiæ suæ debitum.*

2. Yet such an alien, coming in after the war begun without

the king's licence or safe conduct, cannot claim the privilege allowed by the statute of *Magna Charta*, cap. 30. to those that were here before the beginning of the war. 2 *Co. Inst.* 58. 3. That by the law of *England* debts and goods found in this realm belonging to alien enemies belong to the king, and may be seized by him. 19 *E. 4.* 6. 7 *E. 4.* 13. and therefore in debt brought by an alien enemy it is a good plea in bar *primâ facie*, that the person is an alien born *in G. in partibus transmarinis sub obedientâ Philippi regis Hispaniæ hostis & inimici domini regis*; so that, tho' to some purposes he is under the king's protection, so as to be guilty of treason, if he conspire against the king's life, yet his goods are not by law privileged from confiscation, and the reason is, because he might secure his goods by purchase of letters patents of denization, and he shall not take away the king's rights by his neglect therein.

But then, what if in truth our merchants have liberty of reclaiming their goods and recovering their debts in the hostile country? May the merchant plaintiff reply with this clause of the statute of *Magna Charta*, that "*Nostri mercatores salvi sunt ibi, &c.*"?

I answer, he cannot, for it is reserved to another kind of trial; for the words are "*donec sciatur a nobis vel a capitali justiciario nostro, quomodo mercatores nostri ibi tractentur.*" The king must be ascertained of the truth of the fact, in whose cognizance it best lies; and if he be satisfied, that our merchants are permitted to recover their debts in the hostile kingdom without impediment or confiscation, this is to be notified and declared by some proclamation, or instrument under the great seal declaring the fact, and allowing them to prosecute for their debts here; and then, by virtue of this statute or public declaration, the merchant alien plaintiff may reply with this special matter in maintenance of his action.

Here somewhat may be of use to be said touching treasons by embassadors of foreign princes, wherein altho' sometimes reason of state and the common interest of princes do *de facto* govern in these cases, yet it will not be amiss to consider

consider the opinions and practices of former times in relation to this matter.

First, If an *Englishman* born, tho he never took the oath of alligance, becomes a sworn subject to a forein prince, and is employed by him into *England* as his minister, agent or embassador, and here conspires against the king's life, he shall be indicted and tried for treason, as another subject should be; and the reason is, because no man can shake off his country wherein he was born, nor abjure his native soil or prince at his pleasure. This was the case of *Dr. Story*, who had sworn alligance to the crown of *Spain*, and was here condemned and executed for treason. *Vide Camden's Eliz. 14 Eliz. p. 162. (d)*

Secondly, But if a foreiner being the agent, minister or embassador of a forein prince either in amity or enmity with the king of *England* come over with or without the king's safe conduct, and here conspire against the life of the king, or to raise rebellion or war against him, some have been of opinion, that he may be indicted of treason; but by the civilians he cannot, because he came in as a forein embassador representing the person of his prince, and therefore is not to be so dealt with in such case, but by the law of nations may be dealt with as an enemy, not as a traitor; and tho he have the protection and safe conduct of the king of *England*, yet it is under a special capacity, and for a special end, namely, as a forein agent; but if he be criminally proceeded against, it must be as an enemy by the law of war or nations, and not as a traitor; but how far and in what cases he may be dealt with as an enemy, remains to be farther considered. *Camden's Eliz. sub anno 1571. p. 164.*

Thirdly, Therefore those, that are most strict after the rights and privileges of embassadors, yet seem to agree, that if he do not only conspire the death of the king or the raising a rebellion against him, but actually attempt such an act, as actually or interpretatively is a consummation thereof, tho

possibly the full effect thereof do not ensue, yet he may be dealt withal as an enemy, and by the law of nations he may be put to death, as if he should stab or poison the prince, and yet doth not kill him, or raise an actual rebellious army, or should levy an actual war against the prince, to whom he was sent, and in that prince's country, as *Fabius (e)* the Roman ambassador to the Gauls, by challenging and fighting with the champion of the Gauls; *Plutarch in vita Numæ*, the prince, to whom he is sent, may without consulting the prince, that sends him, inflict death upon such an ambassador by the law of nations, as an enemy: "*Consummata autem sunt, que cœsque producta sunt, quo produci ab hominibus solent, & que delinquendi finem statuere solemus. Vide Albericus Gentilis, Lib. II. cap. 2. de legationibus.*"

Fourthly, But in case of a bare conspiracy against the life of the king, or a conspiracy of a rebellion or change of government, *novarum rerum molimina*, there is great diversity of opinions among learned men, how far the privilege of an ambassador exempts him from penal prosecution as an enemy for such conspiracies or inconsummate attempts, that do not proceed farther than the machination, solicitation or conspiracy.

Upon an attempt of this nature by the bishop of *Rosse*, agent and ambassador of the queen of *Scots*, 14 *Eliz.* the question was propounded to *Lewes, Dale, Drury, Aubry*, and *Jones*, doctors of law, *viz.*

"Whether an ambassador, who stirreth up rebellion against the prince to whom he is sent, should enjoy the privileges of an ambassador, and not be liable to the punishments of an enemy?"

They answered, that such an ambassador hath by the law of nations, and by the civil law of the *Romans* forfeited all the privileges of an ambassador, and is liable to punishment. See the rest of the resolutions touching this matter *Camden's Eliz. sub anno 1571. p. 164, 165. & ibidem p. 370.*

Hereupon he was committed to the *Tower*, but yet no criminal process against him as an enemy.

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(e) *Fabius Ambustus.*

And *Mendoza* the *Spanish* embassador, who here in *England* fostered and encouraged treason, was not dealt with according to the utmost severity, that possibly in such cases might be used, but was only sent away, *sub anno 27 Eliz. Camden's Eliz. p. 296.* The lord *L'Aubespine* also, the *French* embassador, that conspired the queen's death, was not proceeded against criminally, but only reprov'd by *Burghley*, and advis'd to be more careful for the future. *Camden's Eliz. sub anno 1587. p. 378, 379.*

And upon these and some antient instances among the *Romans* and *Carthaginians* learned men have been of opinion, that an embassador is not to be punished as an enemy for traiterous conspiracy against the prince, to whom he is sent, but is only to be remitted to the prince, that sent him. *Albericus Gentilis de Legationibus, Lib. II. cap. 18. Grotius de Jure Belli, Lib. II. cap. 18. (f)*, who gives these two instances in confirmation thereof.

The truth is, the business of embassadors is rather managed according to rules of prudence, and mutual concerns and temperaments among princes, where possibly a severe construction of an embassador's actions, and prosecutions of them by one prince may at another time return to the like disadvantage of his own agents and embassadors; and therefore they are rather temperaments measured by politic prudence and indulgence, than according to the strict rules of reason and justice; for surely conspiracies of this kind by embassadors are contrary to the trust of their employments, and may be destructive to the state whereunto they are sent, and according to true measures of justice deserve to be punished, as acts of enmity, hostility and treachery by private persons.

And altho of all hands it is admitted, that the prince, to whom the embassador is sent, is the judge of the miscarriage of such forein embassador without any application to the master, from whom he is sent, and without any actual dedication or giving him up to the judgment of the law; yet they assign this reason of the difference between a bare conspiracy or machination against the prince, and an actual attempt of

treason, whether against his person or government, which hath attained as great a consummation, as such ambassador is able to effect, as procuring the wounding of the prince, or an actual attempt to poison him, tho' death ensue not, or an actual raising of a rebellious army against him; because in these latter the mischief is consummate, as far as the ambassador could effect it, and so prohibited not only by the civil and municipal laws, but by the laws of nations; but inconsummate machinations, according to their opinions, are raised to the *crimen lese majestatis* by civil or municipal laws or constitutions; and they think it too hard, that an ambassador or foreign agent, who doth *sustinere personam principis*, should be obnoxious to a capital punishment for bare machination or conspiracy, which is a secret thing and of great latitude; but this, as I have said, is rather a prudential and politic consideration, and not according to the strict measure of justice.

But now, altho' it should be admitted that a foreign ambassador committing a consummate treason is not to be proceeded against as a traitor, but as an enemy; yet if he, or his associates commit any other capital offense, as rape, murder, theft, they may be indicted and proceeded against by indictment in an ordinary course of justice, as other aliens committing like offenses; for tho' those indictments run *contra pacem regis*, yet they run not *contra ligeantie sue debitum*; and therefore, when in the late troubles the brother and servants of the Portugal ambassador committed a murder in the Exchange (g), they were tried and convicted by a special commission of *oyer and terminer* directed to two judges of the common law, some civilians, and some gentlemen, to proceed according to the ordinary course *secundum legem & consuetudinem regni Angliæ*, whereupon some of them were convicted by jury, and had judgment; and, as I remember, some of them were executed (h). And yet many civili-
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(g) The New Exchange in the Strand. Newgate, but he was retaken, and

(h) Don Pontalcoon Sa, the ambassador's brother, was condemned to die for it; he had like to have prevented his execution by making his escape out of Tower-hill, July 10, 1654. the same day the ambassador signed the peace between England and Portugal.

ans (i) allow the same privilege to the *comites legati*, as to the embassador himself.

And the difference between proceeding against an alien (whether embassador or other) in cases of felony and treason, is well illustrated by the book of 40 *Aff.* 25. where a *Norman* captain of a ship with the help of *English* mariners committed robbery and piracy upon the narrow seas; the *English* pirates were convict and attaint of treason (k), but the *Norman* captain was attaint of felony, but not of treason, because it could not be said *contra ligeantie sue debitum*.

The queen consort the wife of the king, or the husband of the queen regent, compassing the death of the king her husband or the queen regent his wife, are persons compassing within this act. *Co. P. C.* p. 8.

II. As to the second inquiry, what shall be said a king, queen, or their eldest Son, within this law.

1. The words *our lord the king*, &c. extend to his successor, as well as to him. (l)

1. Because it is a declarative law.

2. Because usually acts of parliament speaking thus generally, and not confining it to the person of that king, when the law passed, include his successor; therefore the statute of 8 *H.* 6. cap. 11. 23 *H.* 8. for *Brewers*, 27 *H.* 8. cap. 24. that were limited to continue during the pleasure of our lord the king (m), continued after that king's death: *Mich.* 38 & 39 *Eliz.* *Cro. Eliz.* 513. Lord *Darcie's* case. The statute of 11 *H.* 7. c. 1. of aiding our lord the king in his wars extends to the successor (n). *Hill.* 10 *Fac.* 12 *Co. Rep.* 109. *M.* 24 *Eliz.* *Moore*

176.

(i) *Dig. Lib.* XLVIII. tit. 6. ad leg. *Jul. de vi publica*, l. 7. *Grot. de jur. Belli*, *Lib.* II. cap. 18. §. 8.

(k) For before the 25 *E.* 3. piracy was petit treason. *Co. P. C.* 113. and tho this case be quoted in the 40 *E.* 3. yet it must be intended to have happen before the statute of 25 *Ed.* 3. because piracy, not being enumerated therein among the species of treason, has never been counted treason since that statute. *Co. P. C.* 8.

(l) *Vide Co. P. C.* p. 6.

(m) Of these statutes the first only is so limited; but the 23 *H.* 8. cap. 4. sect. 5, 14. and 27 *H.* 8. cap. 24. sect. 10. only

name the king without the addition of his heirs and successors. 10 *H.* 7. 7. b. it is said by *Keble* with relation to 9 *H.* 6. cap. 2. and not denied by the court, that where a statute limits to continue so long as it shall please our lord the king, it continues in force, if no proclamation be made to the contrary in the times of that king or of any of his successors.

(n) This statute comes not up to the point, because the words of it are not, our lord the king, but, the king and sovereign lord of this land for the time being. Our author seems to have intended the *Irish* statute of 12 *H.* 7. called *Pyming's*

176. *Coke Litt.* 9. b. (o). But the statute of 34 & 35 H. 8. cap. 26. giving power to our said lord the king to alter the laws of *Wales*, died with him (p); yet *in majorem cautelam* it was specially repeald by the statute of 21 Jac. cap. 10.

2. The heir of the king is a king within this act the next moment after the death of his ancestor, and commenceth his reign the same day the ancestor dies; and therefore the compassing his death before coronation, yea before proclamation of him, is a compassing of the king's death, for he is a king presently upon the ancestor's death; and the proclamation or coronation are but honourable ceremonies (q) for the farther notification thereof: resolved: *Jac.* in the case of *Watson and Clerk. Co. P. C. p. 7.*

3. The queen regent, as were queen *Mary* and queen *Elizabeth*, is a king within this act. (r)

4. A king *de facto* but not *de jure* (s), such as were H. 4. H. 5. H. 6. R. 3. H. 7. being in the actual possession of the

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Poyning's act, upon which act a doubt was conceived, whether it extended to the successors of H. 7. for that the act speaks only of the king generally, and not of his successors: the chief justices, chief baron, attorney, and solicitor general were of opinion; that the word *king* imported his politic capacity, which never dies; and therefore being spoke indefinitely, extended in law to all his successors, and was so expounded by an *Irish* act in the 3 & 4 *Phil. & Mar. 12 Co. Rep. 109.*

(o) The case in *Moore* relates to statutes during the pleasure of the king: the words are, "*Walmesley* moved a question, whether the demise of the king determines a statute limited to continue during the king's pleasure, and the whole court agreed that the demise of the king determines his will."

(p) The words of that statute, §. 1: 9. are, "*That the king's most royal majesty shall and may, &c. as to his most excellent wisdom and discretion shall be thought convenient; and also to make laws, &c. at his majesty's pleasure.*" It was resolved by the justices *Hil. 5 Jac. 12 Co. Rep. 48.* that this was a temporary power, and confined to the person of king *Henry VIII.* *Vide Plowden 176. b. & c. 458. a.*

(q) The coronation is something more than only an honourable ceremony, for it is a solemn engagement to govern according to law, which was always required by the antient constitution of the kingdom. *Brompton* speaking of the coronation of *W. 1.* says the archbishop of *York* performed the office, *Ipsumque Gulielmum regem ad jura ecclesiæ Anglicanæ tuenda & conservanda, populumque suum recte regendum, & leges rectas statuendum sacramento solemniter adstrinxit;* and *Bract. Lib. III. cap. 9.* says that the king of *England* *debet in coronatione sua in nomine Jesu Christi præstito sacramento hæc tria promittere populo sibi subdito, &c.* See also *1 W. & M. cap. 6.*

(r) *Vide Co. P. C. p. 7.* This appears by the declarative law in favour of queen *Mary*, *1 Mar. cap. 1. sess. 3.*

(s) This distinction, which with respect to the kingly office was never known in our law before the statute of *1 E. 4.* seems to have been purposely invented to serve the turn of the house of *York*; nor do I find any such distinction ever mentioned or supposed in any of our antient law-books, save only in *Bago's* case, *9 E. 4. 1. b.* cited by our author *p. 61.* for the doubt conceived by *Markham*, *4 E. 4. 43. a.* concerning the authority

crown is a king within this act, so that compassing his death is treason within this law; and therefore the 4 E. 4.

20. a.

thority of coroners chosen in the time of H. 6. was not founded (as some have supposed) on H. 6. being only king *de facto*, but on another point, *viz.* whether the demise of the crown did not determine the power of coroners, as it does the commissions of judges and other commissioners; and as to *Bagot's* case, if carefully considered, it will but little serve the purpose of such a distinction, for the principal point in that case was concerning the validity of letters patent of denization granted to *Bagot* by H. 6. whether they were void by the act of 1 E. 4. set forth in the pleadings; this point was not argued by the judges, but by the serjeants and apprentices. 9 E. 4. 2. a. it will therefore be necessary to distinguish the discourse of the counsel from the resolution of the court.

Bagot's counsel asserted, "That all judicial acts relating to royal jurisdiction, which were not in diminution of the crown, tho done by an usurper, would nevertheless bind the king *de jure* upon his regrefs, that H. 6. was not merely an usurper, the crown having been entailed on him by parliament, that *Bagot's* denization was an advantage to the prince on the throne, for the more subjects he had, the better it was for him; and they likened it to the case of recoveries suffered in a court-baron, while the disseisor was in possession, which would continue in force notwithstanding the re-entry of the disseisee."

This was all that could be expected for them to say, considering that E. 4. was then on the throne, and they were obliged to admit, that grants of the regal revenue made by H. 6. were void against E. 4. because the act of parliament of E. 4. which declared H. 4. H. 5. and H. 6. usurpers, vested in E. 4. all such manors, castles, honors, liberties, franchises, reversions, remainders, &c. and all hereditaments with their appurtenances, whatsoever they were, in England, Wales and Ireland, and in Calais, as king Richard II. had on the feast of St. Matthew the twenty-third year of his reign in right of the crown of England and

lordship of Ireland: all mesne grants therefore of such manors, &c. were by this act indisputably defeated.

The counsel on the other side objected, "That the letters patent of denization were void, for that the king ought not to be in a worse condition than a common person; and that if a common person were disseised and re-entered, his re-entry would defeat all mesne acts; and that therefore E. 4. being in by descent from king *Richard*, and this act being but an affirmation of the common law, his regrefs would avoid all acts done by the usurper, for which reason provision was made in that act for grants of wards, licences of mortmains, charters of pardon and judicial acts, but no provision was made for grants of denization; that the patent in controversy was to the disadvantage of the king, since it was not reasonable, that such an alien should be made his subject against his will, for by the same reason H. 6. might have made twenty thousand *Frenchmen* denizens; that if a league was made between H. 6. and another king, it would not bind E. 4. and yet such league is intended for the advantage of the realm; that an exemption granted by H. 6. from being put upon juries in assises, &c. would now be void."

Here *Billing* the chief justice interposed and said, *I do not agree to this*; he added, "It pertains to every king by reason of his office to do justice and grace, justice in executing the laws, &c. and grace in granting pardon to felons, and such legitimation as this is." *Yelverton* seemed at first to think that the denization was void, not because the regrefs of E. 4. avoided all mesne acts done by H. 6. but because the act of 1 E. 4. resumed all liberties and franchises, and denization being a liberty was therefore resumed.

The cause was adjourned, during which time it was abated by the death of *Swirenden* one of the plaintiffs; a new assise was brought by *Bagot*, and the same matter was pleaded as before; the assise was taken, and the verdict was in favour of *Bagot* 9 E. 4. 5. the defendant's counsel moved

20. *a.* (*t.*), a person that compassed the death of *H. 6.* was attainted for that treason in the time of the rightful king; but had it been an act of hostility in assistance of the rightful heir of the crown (*), which afterwards obtained, this had not been treason, but *é converso* those that assisted the usurper, tho in actual possession of the crown, have suffered as traitors, as appears by the statute of 1 *E. 4.* (†), and as was done upon the assistants of *H. 6.* after his temporary re-adeption of the crown in 10 *E. 4.* and 49 *H. 6.*

5: A king admitting by act of parliament his son *in consortium imperii*, as was done by *H. 2.* whereby there was *rex pater* and *rex filius*, only the father reserved to himself the lige homage or alligance of his subjects, yet the son actually administered the kingdom; the father continued a king, and
a trea-

moved in arrest of judgment, and *Brian* (who was of counsel against *Bagot*, and not one of the judges) repeated the former objection, that since *E. 4.* was in possession by remitter, as cousin and heir of king *Richard*, the patent of denization by *H. 6.* who was but an usurper and intruder was void. 9 *E. 4.* 11. but the justices said, that they had conferred upon all points of this case with the justices of the common pleas, and they were all of opinion, that those matters were not sufficient to arrest judgment; and accordingly judgment was given for *Bagot* 9 *E. 4.* 12. *a.* abridged in *Br. Patens* 21. *Denizen* 3. *Chartre de Pardon* 22. *Exemption* 4. *Judgment* 42. *F. Assise* 29. *Denizen* 1.

From this state of the case it appears, that the question was entirely upon the construction of an act of parliament, and not upon any maxims of common law; and tho it was said, that that act was an affirmance of the common law, yet that was only the saying of counsel, and unsupported by any book-case or record: so that the distinction here taken by our author between a *rex de facto* and a *rex de jure* being no way warranted by the constitution or common law of this kingdom, all that is here said by him on that supposition must fall to the ground.

(1) This case is cited before by our author *p.* 61. but is somewhat differently related in *Stow's Annals*, *p.* 418. *Seld. Titles of Honour*, *cap.* 5. *p.* 654.

(*) But who shall take upon them to determine who that is? Our author therefore prudently adds, *which afterwards obtained*, for this is the most effectual way of deciding questions of this nature; but then by the same rule, *if he should not obtain*, such act of hostility had been treason, for it cannot be imagined, that any prince in the actual possession of the government will suffer his own title to be disputed, nor indeed is it fitting, that private subjects should set themselves up for judges in such an affair, whose duty it is to pay a legal obedience to the powers, that are in fact set over them; *for the powers*, that be, *are ordaind of God: Rom. xiii. 1.*

This serves to shew how idle the distinction is between a *rex de jure* and a *rex de facto*, which is not only founded on a precarious bottom, but also must in fact prove a distinction without a difference, being equally serviceable to all sides and parties; and thus it was in regard of *H. 6.* and *E. 4.* who were both of them by turns declared by parliament to be rightful kings and usurpers.

(†) This must have been for acts before *E. 4.* first obtained the crown, and therefore was wrong according to our author's own doctrine, because, as he says below, even the rightful heir before he has got possession of the crown is not a king within the statute of 25 *E. 3.*

a treason committed against him by his son or any of his subjects was treason within this act; and so was the son a king within this act, as in reference to all but the father, a subordinate king, that had the *jura imperii*, as the king of *Scots* was after his homage done to king *Edward I.* and therefore compassing his death by any of his subjects had been high treason within this act, if it had been then made; for it is mistaken in lord *Coke's P. C. p. 7.* that *H. 2.* resigned his crown, for he continued still *rex de facto & de jure*, as *Hoveden* tells us. *Vide supra cap. 10.*

Having thus shewn who is a king within this act, we shall the more easily see who is not a king within this act.

1. The right heir of the crown, during such time as the usurper is in plenary possession of it, and no possession thereof in the heir, is not a king within this act; such was the case of the house of *York* during the plenary possession of the crown in *H. 4. H. 5. H. 6.* but if the right heir had once the possession of the crown as king, tho an usurper hath gotten the possession thereof, yet the other continues his style, title and claim thereunto, and afterwards re-obtains the full possession thereof, a compassing the death of the rightful heir during that interval, is a compassing of the king's death within this act, for he continued a king still, *quasi* in possession of his kingdom; this was the case of *E. 4.* in that small interval, wherein *H. 6.* re-obtained the crown, and the case of *E. 5.* notwithstanding the usurpation of his uncle *R. 3.*

2. If a king voluntarily resign, as some in other countries have done, and this resignation admitted and ratified in parliament, he is not afterwards a king within this act (*u*); but we never had such an example in *England*, for that of *R. 2.* was a constrained act, touching which and the deposition of *E. 2.* I shall not say farther, for they were acts of great violence and oppression.

3

Only

(*u*) The same reason holds in the case of a king, who is deemed by parliament to have abdicated, or by actions subversive of the constitution virtually to have renounced the government; this was the

case of king *James II.* who, tho not in words, yet by acts and deeds equally expressive had renounced holding the crown upon the terms of the constitution.

Only thus much is certain, that altho E. 2. had a kind of pretended deposing, and his son E. 3. took upon him the kingly name, and office, yet in the opinion of those times E. 2. continued, as to some purposes, his regal character, for in the parliament of 4 E. 3. Mortimer, Berisford, Gurney, and others had judgment of high treason given against them for the death of E. 2. after his deposition.

Neither was this judgment grounded simply upon that old opinion in Briton (x), that killing of the king's father was treason; for, tho in some parts of that record, as in the judgment of the lords against Mortimer, the words are, *Touchant le mort seigneur Edward pere nostre seigneur le roy, qe ore est,---countes, barons, & peres, come jugges de parlement, agarderent & adjudgerent le dit Roger, come trefor & enemy de roy & de realme, feust treine & pendu*; yet in other parts of that roll of parliament he is styled at the time of his murder *seignior lige*, and sometimes *rex*, as n. 6. The lords make their protestation, that they are not to judge any but their peers; yet they declare, that they gave judgment upon some, that were not their peers, in respect of the greatneis of their crimes; *et ce per encheson de murder de seigneur lige, &c.* and in the arraignment of Thomas lord Berkele for that offense, the words of the record are, *Qualiter se velit acquietare de morte ipsius domini regis*, who pleaded, *Quod ipse de morte ipsius domini regis in nullo est inde culpabilis*; and the verdict, as it was given in parliament 4 E. 3. n. 16. and the record is, *Quod predictus Thomas in nullo est culpabilis de morte predicti domini regis patris domini regis nunc*; so that the record styles him *rex* at the time of his death, and yet every one acquainted with history knows, that his son was declared king, and took upon him the kingly office, and title upon the twenty-fifth, or, according to *Walsingham*, the twentieth of *January*; and E. 2. was not murdered till the twenty-first of *September* following.

I have been the longer in this instance, tho it were before the making of the statute of 25 E. 3. when treason was determined according to the common law, that it may appear,

E e that

(x) *Brit. cap. 22. Co. P. C. p. 7.*

that this judgment was not singly upon this account, that he was father to king *E. 3.* but that notwithstanding the formal deposing of him, and that pretended or extorted resignation of the crown mentiond by the histories of that age, yet they still thought the *character regius* remaind upon him, and the murder of him was no less than high treason, namely the killing of him, who was still a king, tho deprived of the actual administration of his kingdom.

3. The husband of a queen regent is not a king within this law, for the queen still holds her sovereignty entirely, as if she were sole: *vide 1 Mar. cap. 2. sess. 3.* and for the remedy hereof there was a special temporary act made enacting and extending treason as well to the compassing of the death of king *Philip* of *Spain* husband to queen *Mary*, as of the queen, and for the making of other acts against the king, as against the queen, within the compass of high treason, during the continuance of the marriage between them. *1 & 2 Phil. & Mar. cap. 10.* so that it seems, tho the husband of a queen regent be as near to him, as the wife of a king regnant, the statute of *25 E. 3.* declaring the compassing of the death of the king's wife to be treason, did not extend to the husband of a queen regent. (y)

4. A *prorex, viceroy, custos regni, or justitiarius Angliæ*, which import in substance the same office, *viz.* the king's lieutenant in his absence out of the kingdom, is not a king within this act (z), tho his power be very great, and all commissions, writs, and patents pass under his *teste*; and the same law is touching the lord lieutenant or *justitiarius Hiberniæ* or his deputy. *Vide statut. Hiberniæ.*

Rot. Parl. 31 H. 6. n. 38 & 39. *Richard* duke of *York* by the king's letters patent, and by consent of parliament was constituted *protector & defensor regni, & ecclesiæ Anglicanæ, & consiliarius regis principalis*, till the full age of the prince, or till discharged of that employment by the king in parliament, by the consent of the lords spiritual and temporal; tho this were a high office, and exceeded much the power of a protector of the king during his minority, such

(y) *Co. P. C. p. 6, 7.*(z) *Co. P. C. p. 8.*

as were the earl of *Pembroke* to *H. 3.* and the duke of *Somerset* to *E. 6.* yet this protector was not a king within this statute.

III. I come to the third division, what shall be said *à compassing or imagining of the death* of the king, queen, or prince.

The words *compass or imagine* are of a great latitude.

1. They refer to the purpose or design of the mind or will; tho the purpose or design take not effect.

2. Compassing or imagining singly of it self is an internal act, and without something to manifest it could not possibly fall under any judicial cognizance, but of God alone; and therefore this statute requires such an overt-act, as may render the compassing or imagining capable of a trial and sentence by human judicatories.

And yet we find that other laws, as well as ours, make compassing or conspiring the death of the prince to be *crimen lese majestatis*, tho the effect be not attained.

Ad legem Juliam majestatis in Codice (a) in the law of *Honorius* and *Arcadius*, *Quisquis cum militibus, vel privatis, vel barbaris scelestam inierit factionem, vel factionis ipsius susceperit sacramentum vel dederit, de nece etiam virorum illustrium, qui consiliis & consistorio nostro intersunt, senatorum etiam, (nam & ipsi pars corporis nostri sunt) vel cujuslibet postremo, qui nobis militat, cogitaverit, (eadem enim severitate voluntatem sceleris, quæ effectum, puniri jura voluerunt) ipse quidem, utpote majestatis reus, gladio feriat, bonis ejus omnibus fisco nostro additis.*

A bare accidental hurt to the king's person, in doing a lawful act, without any design or compassing of bodily harm to the king, seems not a compassing of the king's death within this act.

Walter Tirrel by command of *William Rufus* shot at a deer; the arrow glanced from an oak, and killed the king; *Tirrel* fled, but this being purely accidental, without intention of doing the king any harm, hath been held not to be a compassing of the king's death. *Co. P. C. p. 6. Paris & Hoveden anno ult. Willielmi secundi.*

Calculating

(a) *Lib. IX. tit. 8. l. 5. præ.*

Calculating of the king's nativity, or thereby or by witchcraft, &c. seeking to know, and by express words, writing, &c. publishing and declaring how long the king shall live, or who shall succeed him, or advisedly or maliciously to that intent uttering any prophecies, seems not a compassing of the king's death within the statute of 25 E. 3. (b), but was made felony during the life of queen Elizabeth by 23 Eliz. cap. 2. and before that was only punishable by fine and ransom. Co. P. C. p. 6.

Compassing the death of the king is high treason (c), tho it be not effected; but because the compassing is only an act of the mind, and cannot of it self be tried without some overt-act, to evidence it, such an overt-act is requisite to make such compassing or imagination high treason. *De quo infra.*

IV. Therefore as to the *overt-act* in case of compassing the death of the king, queen, or prince.

1. Tho the words in the statute of 25 E. 3. *and be provably thereof attaind by open deed, &c.* come after the clause of levying of war, yet it refers to all the treasons before-mentiond, viz. compassing the death of the king, queen, or prince. Co. P. C. 6. 12. and therefore what is said here concerning the compassing of the death of the king is applicable to queen and prince.

And therefore in an indictment of treason for compassing the death of the king, queen, or prince, there ought to be set down both the treason itself, viz. *Quod proditorie compassavit & imaginatus fuit mortem & destructionem domini regis, & ipsum dominum regem interficere*, and also the overt-act, & *ad illam nefandam & proditoriam compassationem & propositum perimplend'*, and then set down the particular overt-act certainly and sufficiently, without which the indictment is not good. Co. P. C. p. 12.

2

2. If

(b) Even before that statute, viz. Hil. 18 E. 2. Rot. 24. *rex coram rege*, there was an instance of several persons charged with endeavouring to compass the king's death by necromancy by making his image in wax, &c. yet they were appeald

only *de feloniam & maleficio*, and were all acquitted by the jury.

(c) Inasmuch that where the king is actually murdered, it is the compassing his death, which is the treason, and not the killing, which is only an overt-act. *Kel. 8.*

2. If men conspire the death of the king and the manner, and thereupon provide weapons, powder, harness, poison, or send letters for the execution thereof; this is an overt-act within this statute. *Co. P. C. p. 12.*

3. Tho the conspiracy be not immediately and directly and expressly the death of the king, but the conspiracy is of something, that in all probability must induce it, and the overt-act is of such a thing, as must induce it; this is an overt-act to prove the compassing of the king's death, which will be better explained by the instances themselves, and therefore.

4. If men conspire to imprison the king by force and a strong hand, 'till he hath yielded to certain demands, and for that purpose gather company or write letters, this is an overt-act to prove the compassing of the king's death, for it is in effect to despoil him of his kingly government, and so adjudged by all the judges in the lord *Cobham's* case, 1 *Fac. (d)* and in the case of the earl of *Essex*, 43 *Eliz. (e)*. *Co. P. C. p. 12.* But then there must be an overt-act to prove that conspiracy to restrain the king, and then that overt-act to prove such a design is an overt-act to prove the compassing the death of the king.

But then this must be intended of a conspiracy *forcibly* to detain or imprison the king; and therefore, when in the time of *R. 2.* in parliament a commission was somewhat hardly gotten from the king, which seemed to curb his prerogative too much, the answer of the judges to the general question, "*Qualem pœnam merentur illi, qui compulerunt sive arctarunt regem ad consentiendum dicti statuti ordinationi & commissioni? ad quam questionem unanimiter responderunt, quod sunt, ut proditores, merito puniendi, Rot. Parl. 11 R. 2. (f)*." was too rash and inconsiderate, and for which the judges themselves were condemned as traitors, as before is shewn (*g*); for *compulerunt* and *arctaverunt* may have a double construction, either it may be intended of an actual force used upon the person of the king, as by restraint, imprisonment,

(d) *State Trials, Vol. I. p. 206.*
 (e) *State Trials, Vol. I. p. 199.*

(f) *State Trials, Vol. I. p. 9.*
 (g) *cap. 11. p. 94.*

ment, or injury to his person, to enforce his consent to that commission; and then it had not differed from the execrable treason of the *Spencers*, who declared, that since the king could not be reformed by suit of law, it ought to be done *per aspertee*, for which they were banished by two acts of parliament (*b*). *vide* 7 *Co. Rep. fol. 11.* in *Calvin's case*. 2. Or it might be intended, not of a personal compulsion upon the king, but by not granting supplies, or great persuasion or importunity, and then it could not be treason; the latter whereof was the only compulsion or arctation, which was used for the obtaining of that commission.

And therefore the judges, that delivered that opinion, were inexcusable in their decision of treason under such ambiguous and large expressions of *compulerunt & arctaverunt*; and tho the parliament of 11 *R. 2.* was repealed by 21 *R. 2.* yet that again was repealed 1 *H. 4. cap. 3.*

5. A conspiring to depose the king, and manifesting the same by some overt-act, is an overt-act to prove the compassing of the death of the king within this act of 25 *E. 3. vide* 1 *Mar. B. Treason 24. (i). Co. P. C. p. 12.*

It is true, that by the statute of 21 *R. 2. Ca. 3.* it was enacted, *That every man that compasseth or purposeth the death of the king, or to depose him, or to render up his homage liege, or he that raiseth people, and rideth against the king to make war within his realm, and of that be duly attainted, and adjudged in parliament, shall be adjudged as a traitor of high treason against the crown*; and this act is particularly repealed by the statute of 1 *H. 4. cap. 10.* as a great snare upon the subject; for it is recited, that by reason thereof no man knew *how he ought to behave himself, to do, speak, or say for doubt of such pains of treason.*

4

But

(*b*) One in the reign of *Edward II.* called *Exilium Hugonis le Spencer*; and the other in anno 1 *Edward III. cap. 1.*

(*i*) *Broke* makes this *quære*: "*Quære del depriv', car home poet depriver, & uncore intende null morte, & pur cest cause un statute fuit ent fait tem-pore H. 8. & E. 6. Nota.*" The statutes here refered to are 26 *H. 8. cap. 13.* by which it was made high treason "*to wish or desire by words or writing, or to imagine, invent, or attempt to*

deprive the king, the queen, or their heirs apparent of the dignity, title, or name of their royal estates." And 1 *E. 6. cap. 12.* by which it was made highly penal (for the third offense high treason) "*to compass or imagine by open preaching, express words or sayings, to depose or deprive the king, his heirs, or successors, kings of this realm from his or their royal estate or titles to or of the realm aforesaid.*"

But the true reason was not in regard of the four points themselves, for many of them were treasons within the statute of 25 E. 3. but that, wherein the act of 21 R. 2. varied from the act of 25 E. 3. were these: 1. That the compassing to levy war is made treason by the statute of 21 R. 2. whereas the levying of war only was treason by 25 E. 3. Again 2dly, Tho compassing the death of the king was treason within the letter of 25 E. 3. and compassing to depose him was an evidence or overt-act of a compassing of the king's death within the meaning of the act of 25 E. 3. yet both required an overt-act. The statute of 21 R. 2. makes the bare purposing, or compassing, treason, without any overt-act; and tho it restrain the judgment thereof to the parliament, yet it was too dangerous a law to put mens bare intentions upon the judgment even of parliament under so great a penalty, without some overt-act to evidence it: this was one reason of the repeal of the treasons declared by the statute of 21 R. 2. but this was not all, for in that parliament of 21 R. 2. the resolutions of the judges to the questions propounded by the king are entred at large, and received an approbation not only by the suffrage of some other judges and serjeants, but by the statute made in the same parliament, as appears at large by the statute of 21 R. 2. cap. 12.

And therefore, wholly to remove the prejudice that might come to the king's subjects by those rash and unwarrantable resolutions, the statute of 1 H. 4. Ca. 10. was made, reducing treasons to the standard of 25 E. 3. and the entire parliament of 21 R. 2. also repeald as appears 1 H. 4. Ca. 3.

6. Regularly words, unless they are committed to writing, are not an overt-act within this statute. *Co. P. C. p. 14. (k)*; and the reason given is, because they are easily subject to be
mistaken,

(k) *Vide Co. P. C. p. 38, 140.* The passages quoted *S. P. C. 2. b.* from *Bracton* and *Britton*, only describe the form of the accusation, but are far from proving that words alone were, in the opinion of those writers, a sufficient evidence of treason; but if they were so at common law, yet it does not follow, that they would be so by the statute of 25 E. 3.

which expressly requires the proof of an overt-act, and consequently disallows the evidence of bare words, for words and acts are contra-distinguished from each other. See *Co. P. C. 14. in margine.* The preamble of 1 *Marie, cap. 1. sess. 1.* makes it matter of complaint, *that many had for words only sufferd shameful death.*

mistaken, or misapplied, or misrepeated, or misunderstood by the hearers. (*l*)

And this appears by those several acts of parliament, which were temporary only, or made some words of a high nature to be but felony. *Co. P. C. cap. 4. p. 37.* The statute of 3 *H. 7. cap. 14.* makes conspiring the king's death to be felony; which it would not have done, if the bare conspiring without an overt-act had been treason.

26 *H. 8. cap. 13.* malicious publishing by express writing or words, that the king were an heretic, schismatic, tyrant, infidel, or usurper, enacted to be high treason. (*m*)

1 *E. 6. cap. 12.* If any person or persons do affirm or set forth by open preaching, express words or sayings, that the king, his heirs or successors, is not, or ought not to be supreme head of the church of *England* and *Ireland*; or is not or ought not to be king of *England, France* and *Ireland*; or do compass or imagine by open preaching, express words or sayings to depose or deprive the king, his heirs or successors from his or their royal estate or titles aforesaid, or do openly publish or say by express words or sayings, that any other person or persons, other than the king, his heirs or successors, of right ought to be kings of this realm; every such offender being convicted for his first offense shall forfeit his goods, and be imprisoned during the king's pleasure; for the second offense shall lose his goods and the profits of his lands during life, and shall suffer imprisonment during life; and the third offense is made high treason.

But if this be done by writing (*n*), printing, overt-deed or act, then every such offense is high treason by the act of 25 *E. 3.*

4

So

(*l*) This is one but not the only reason, for another reason was, because men in a passion or heat might say many things, which they never designed to do; the law therefore required, that in a case of so nice a nature, where the very intention was so highly penal, the reality of that intention should be made evident by the doing some act in prosecution thereof.

(*m*) This same statute makes it high treason to wish or desire by words or

writing to deprive the king of his dignity.

(*n*) This is said by lord *Coke, P. C. 14.* and in *Sidney's case, State Tr. Vol. III. p. 733.* it is said *scribere est agere; quære tamen,* for if our author argues rightly, that words were not treason by 25 *E. 3.* because there needed new acts to make them so in particular cases afterwards, the same argument holds good with respect to writing, especially if not published; for there were also new acts to make that treason.

So much of this act, as concerns any thing in derogation of the papal supremacy, is repeal'd by the statute of 1 & 2 Ph. & M. cap. 8. And so much, as concerns treason, farther than it stands settled by 25 E. 3. is repeal'd by the statute of 1 Mar. cap. 1. Sess. 1. But the rest of this act, that concerns only misdemeanors, stands perpetual, as it seems.

By 1 & 2 P. & M. cap. 9. Prayers by express words, that God would shorten the queen's days, or take her out of the way, or such like malicious prayer, amounting to the same effect, made treason; but if person penitent upon his arraignment, no judgment to ensue (o); the like provision is made during the queen's life by 23 Eliz. cap. 2.

1 & 2 P. & M. cap. 10. Compassing to levy war against the queen, or to depose her or the heirs of her body, and maliciously, advisedly and directly uttering such compassing by open preaching, express words or sayings; and also affirming by preaching, express words or sayings, maliciously, advisedly and directly, that the queen ought not to be queen of this realm, is punishable by loss of goods, and chattels, whole profits of the offender's lands during life, and perpetual imprisonment; and the second offense is made high treason; but if this be done by writing, printing or overt-act, then it is made high treason.

1 Eliz. cap. 5. the same act almost *verbatim* for the safety of queen *Elizabeth* and the heirs of her body.

By 13 Eliz. cap. 1. Compassing the death or bodily harm of the queen, or to deprive her of the imperial crown, or to levy war against her; and such compassing, maliciously, expressly or advisedly uttered or declared by printing, writing, cyphering, speech, words or sayings; and also malicious, advised and direct publishing and declaring by express words or sayings, that she ought not to be queen, that she is an heretic, schismatic, tyrant, infidel or usurper, is made high treason in the principal, procurers and abettors. (p)

G g

14 Eliz.

(o) This last clause extended to such only, who had been guilty during that session of parliament, for the act had a retrospect to the beginning of the session.

(p) "The indictments and attainders of treason by force of this statute are not more to be follow'd; because the statute, which made them good, is expired."

14 *Eliz. cap. 1.* Compassing to take, or detain, or burn the queen's castles, and such compassing declared by any express words, speech, act, deed or writing, is made felony; but the actual taking, or with-holding, or burning them, is made treason.

13 *Car. 2. cap. 1.* Compassing the death of the king or any bodily harm tending to his wounding, imprisonment or restraint, or to depose him, or to levy war against him, or to stir foreigners with force to invade the kingdom, and such compassing declared by printing, writing, preaching or malicious and advised speaking, is made high treason: publishing or affirming the king to be an heretic or a papist, or that he endeavours to bring in popery; or inciting the people by writing, printing, preaching or other speaking to hatred of his majesty or the government, disables to hold office. (q)

By all which it seems, that regularly, 1. words of themselves cannot make high treason; 2. words of themselves are not a sufficient overt-act within the statute of 25 E. 3. to serve an indictment of compassing the king's death.

And with this agrees that notable case of Mr. Pyne in Croke's reports, T. 4 *Car. (r)*, the words of which are these, "Upon
" *consideration of the precedents of the statutes of treason it*
" *was resolved by the seven judges there named, and so certified to*
" *his majesty, that the speaking of the words there mentiond; tho*
" *they were as wicked as might be, were not treason; for they*
" *resolved, that, unless it were by some particular statute, no*
" *words will be treason; for there is no treason at this day,*
" *(viz. 4 Car. 1.) but by the statute of 25 E. 3. for imagining*
" *the death of the king, &c. and the indictment must be framed*
" upon

5

" expired." *Co. P. C. p. 10.* in the margin.

(q) No penalties are to be incurred by this act, unless the prosecution be within six months next after the offense committed. See also the 4 *Ann. cap. 8.* and 6 *Ann. cap. 7.* whereby it is made high treason to declare by writing or printing, that the queen is not lawful or rightful queen, or that any other person hath right to the crown otherwise than according to the acts of settlement, or that the kings or

queens of this realm by authority of parliament are not able to make laws of sufficient force and validity to bind the descent of the crown: persons who declare the same by preaching or advised speaking incur a *præmunire*; but no prosecution to be for words spoken, unless information be given upon oath before a justice of peace within three days after, and the prosecution be within three months after such information.

(r) *Cro. Car. 125.*

“ upon one of the points in that statute ; and the words spoken
 “ there can be but evidence to discover the corrupt heart of him,
 “ that spake them ; but of themselves they are not treason, nei-
 “ ther can any indictment be framed upon them.”

Baker in his *Chronicle*, p. 229. tells us of two very hard judgments of treason given in the time of E. 4. viz. that of *Walter Walker*, dwelling at the sign of the crown in *Cheapside*, who told his little child, if he would be quiet, he would make him heir of the crown : the other of *Thomas Burdett* (f), who having a white buck in his park, which in his absence was killed by E. 4. hunting there, wished it horns and all in his belly, that counselled the king to it ; whereas in truth none counselled him to it, but he did it of himself : for these words both these were attaind of high treason, and executed : tho *Markham chief justice* rather chose to leave his place, than assent to this latter judgment. *Vide* indictment of treason for treasonable words. P. 3 H. 4. Rot. 4. & 12. *Walton's case* and *South's case.* (t)

Therefore tho this be regularly true, that words alone make not treason or an overt-act, yet it hath these allays and exceptions.

(1.) That words may expound an overt-act to make good an indictment of treason of compassing the king's death, which overt-act possibly of itself may be indifferent and unapplicable to such an intent ; and therefore in the indictment of treason they may be joined with such an overt-act, to make the same applicable and expositive of such a compassing, as may plainly appear by many of the precedents there cited. (u)

(2.) That some words, that are expressly menacing the death or destruction of the king, are a sufficient overt-act to prove that

(f) See *Rapin's history sub anno 1478.* who mentions it in the same manner ; but it appears from the indictment in *Cro. Car.* 120. that he was indicted for calculating the king's and prince's nativity, and declaring that they would not live long ; and also for publishing seditious rhimes and ballads, altho this was not treason, and was therefore made felony

during queen *Elizabeth's* life, by 23 *Eliz. cap. 2. Co. P. C. p. 6.*

(t) *Louth's* (not *South's*) and *Walton's case* are *Trin. 3 H. 4. coram rege rot. 4.* and *P. 3 H. 4. coram rege rot. 12.* in *Sperhauck's case*, who was also convicted of treason for scandalous words.

(u) In *Pyne's case.*

that compassing of his death, *M. 9 Car. B. R. Crobagan's case* in *Croke* (x), who being an *Irish* priest, 7 *Car. 1.* at *Lisbon* in *Portugal* used these words, "I will kill the king (innuendo dominum *Carolus regem Angliæ*) if I may come unto him," and in *Aug. 9 Caroli* he came into *England* for the same purpose (y). This was proved upon his trial by two witnesses, and for that his traitrous intent and the imagination of his heart was declared by these words, it was held high treason by the course of the common law, and within the express words of the statute of 25 *E. 3.* and accordingly he was convicted, and had judgment of high treason; yet it is observable, that there was somewhat of an overt-act joined with it, namely his coming into *England*, whereby it seems to be within the former consideration, namely, tho the coming into *England* was an act indifferent in itself, as to the point of treason; yet it being laid in the indictment, that he came to that purpose, and that in a great measure expounded to be so by his minatory words, the words coupled with the act of coming over make his coming over to be probably for that purpose, and accordingly applicable to that end.

To say that the king is a bastard, or that he hath no title to the crown, is held high treason. *M. 5 Jac. Yelvert. 197.* *Blanchflower's case*, & *ibidem Hill. 8 Jac. Berisford's case.* (z)

P. 13 Jac. B. R. (a) John Owen alias Collins was indicted of treason, for that he, intending the king's death, *falso* & *malitiosè*

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(x) *Cro. Car. 332.*

(y) This case does by no means prove, that words alone are a sufficient overt-act, for here were not only threatening words, but also an act done in order to put that threatening in execution; so that, as our author admits, it comes more properly under the former head; the resolution therefore in *Kelyng 13.* that words are an overt-act, which is founded on this case, must fall to the ground.

(z) This case is likewise reported *Cro. Jac. 275.* and 1 *Bulf. 147.* but both the cases quoted here by our author were actions for scandalous words, and the single point in judgment before the court was, whether the words were actionable, and even as to that *Yelverton* and *Croke* in *Beris-*

ford's case differed from the other judges; so that none of these cases prove, that bare words are an overt-act of treason within 25 *Ed. 3.* indeed where any one not only utters words declaring his own thoughts, but endeavours by promises of reward or other arguments to persuade another to kill the king, or the like, this has been construed an overt-act of treason, because here is something besides the words, here is an attempt to draw another into the design, and is as much an overt-act as an agreement or a consultation how to effect it. *Lord Stafford's case, State Tr. Vol. III. p. 208.* *Charnock's case, State Tr. Vol. IV. p. 581.* 2 *Salk. 631.*

(a) 1 *Roll. Rep. 185.*

litiosè spake these words of the king: *The king being excommunicate by the pope may be lawfully deposed and killed by any whatsoever, which killing is not murder; and being demanded by Henry White, how he durst utter such a bloody and fearful conclusion, Owen answered, The matter is not so heinous, as you suppose, for the king being the less is concluded by the pope being the greater; and it is all one as a malefactor being convicted by a temporal judge is delivered to execution, so the king being convicted by the pope may be lawfully slaughtered by any whatsoever, for this is the execution of the supreme sentence of the pope, as the other is the execution of the law: to this indictment he pleaded not guilty; and it was ruled to be high treason by Coke chief justice and all the court; and being found guilty he had judgment to be hanged, drawn and quartered (b). And here it was said by the king's attorney (c) upon the evidence, and not denied by the court, 1. that the statute of 25 E. 3. as to compassing the king's death was but an affirmance of the common law. 2. That it is treason by the laws of all nations; and therefore an embassador for compassing the king's death shall be executed here for treason; but for other treasons shall be remitted into his own country to be tried. 3. That words of this nature spoken *de futuro* have been adjudged high treason presently; and therefore it was there said to be adjudged in the time of H. 8. in the case of the duke of Bucks, that these words were high treason, *If the king should arrest him of high treason, he would stab him; (vide case de duke Bucks, 13 H. 8. 11. b. 12. a. where there are other words also (d);)* and in the case of another, *If H. 8. will not take again queen Catharine as his wife, he shall**

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not

(b) These words, tho very wicked and of a mischievous tendency, and therefore an high misdemeanor, yet unless accompanied with some circumstances to show, that they were made use of in order to persuade somebody to kill the king, cannot according to the resolution in *Pyne's* case amount to an overt-act of high treason, for they are not any act at all, and besides might be said by a bigotted papist, in the heighth of his ignorant

zeal, without intending or imagining the death of the king.

(c) *Bacon.*

(d) There was also somewhat of an overt-act joined with the words; for being told by a monk, that he should be king, and commanded to obtain the good will of the commonalty, he was accused of giving certain robes for that intent: this duke's case was counted hard, and his fate is lamented by the reporter.

not be king (e); and in the case of Stanley, Temp. H. 7. That if Pierce Warbeck were the son of E. 4. he would take part with him against H. 7. (f)

And note, that king James had been long excommunicate by the pope, and that every Maunday Thursday the pope excommunicates all Calvinists, &c. and all that have withdrawn their obedience from the pope: Owen was executed accordingly. Vide la. (g) the whole judgment and particulars and consequence thereof.

7. Those words, which being spoken will not make an overt-act to make good an indictment of compassing the king's death; yet, if they are reduced into writing by the delinquent either letters or books, and published (h), will make an overt-act in the writer to make good such an indictment, if the matters contained in them import such a compassing (i). Co. P. C. p. 14.

Instances of this kind are many in 4 Car. Croke, ubi supra: but I shall instance particularly only in Williams's case, P. 17 Jac. B. R. (k) Wil-

(e) This was the case of Elizabeth Barton, the holy maid of Kent: the words, as related by lord Bacon in his history of Henry VII. p. 134. were these; "That if king Henry the eighth did not take Catharine his wife again, he should be deprived of his crown, and die the death of a dog." She and her accomplices were attainted of treason by a particular act of parliament, viz. 25 H. 8. cap. 12. upon which lord Coke observes Co. P. C. 14. that they could not have been attainted of treason within 25 E. 3.

(f) Lord Bacon in his history of Henry VII. p. 134. reports, that the criminal words, for which Stanley was accused, were these; "That if he was sure, that the young man (Perkin Warbeck) were king Edward's son, he would never bear arms against him." Upon which the historian makes this observation; "This case seems somewhat an hard case, both in respect of the conditional, and in respect of the other words, &c."---But (says he) "Some writers do put this out of doubt; for they say, that Stanley did expressly promise to aid Perkin, and sent him some help of treasure." And it appears by

the record of Stanley's indictment quoted in Cro. Car. p. 123. that he was accused not only of words, but of an express agreement and conspiracy to bring in Peter Warbeck and make him king. Note, That the lord Bacon, whose history is here quoted, is the attorney general mentioned in Owen's case.

(g) 1 Rol. Rep. 185.

(h) In Peacham's case quoted in Cro. Car. 125. an unpublished writing was admitted in evidence as an overt-act of treason: the like in the case of Col. Sidney, State Tr. Vol. III. p. 710. but both those cases were unwarrantable; as to the first it does not appear there was any judgment, for the book says it was against the opinion of many of the judges, and the latter was resolved at a time of day, when the resolution of the judges in such an affair ought to be but little regarded; that judgment was accordingly reversed by act of parliament 1 W. & M.

(i) As was Trewyn's case, Kelyng 22. for the report says, that the people were exhorted by that book to put the king to death. State Tr. Vol. II. p. 524.

(k) This case (which seems a very hard one) is reported 2 Rol. Rep. 88. and is quoted Cro. Car. 125.

Williams wrote a book, intituled *Balaam's Ass* (l), in which there were many things reproachful and dangerous to the king; and among others, *that the king should die anno domini 1521. and that the realm should be destroyed, because it was anti-christian and the abomination of desolation*: this book he inclosed and sealed up in a box, and sent it to the king (m); and for this he was indicted and attainted and executed for high treason, *vide Co. P. C. 14.* concerning words, where it is said thus: “*But if the same be set down in writing by the delinquent himself, this is a sufficient overt-act within this statute,*” And the same law it is, if it be set down in writing by any other by his command or direction.

8. If there be an assembling together to consider how they may kill the king, this assembling is an overt-act to make good an indictment of compassing the king's death. This was *Arden's case* (n), 26 *Eliz.* and accordingly it was ruled *Decem. 14 Caroli* at *Newgate* in the case of *Tonge* and other confederates. (o)

By my lord *Coke's* opinion *Co. P. C. 14.* “*A conspiracy to levy war is no treason by the statute of 25 E. 3. till war be levied;*” and there have been several particular and temporary acts, that make the conspiracy to levy war treason, as well as compassing the king's death. And therefore he saith, “*That it hath been resolved 35 Eliz. that conspiracy to levy war against the king shall not be said an overt-act, to serve an indictment for the compassing of the king's death, because the clauses concerning compassing of the king's death, and that of levying war, are distinct clauses, and declare distinct treasons; and therefore the latter shall not be an overt-act to serve the former, because this were to confound several classes or membra dividencia of high treason.*”

And

(l) He wrote two books, one called *Balaam's Ass*, and the other *Speculum Regale*.

(m) In this case was first broached that famous doctrine, *scribere est agere*. The court went so far as to declare it to be their opinion, that if this book had been found in his study, it would have been a sufficient evidence of the treason, for

which he was indicted; but this case destroys its own authority by going too far, for they agreed it to be a clear point, that bare words might amount to treason; strange construction of the statute of 25 *Ed. 3.*

(n) *Anderson, pars I. p. 104.*

(o) *Kelyng 17. State Tr. Vol. II. p. 474.*

And yet in the same book p. 12. the case of the earls of *Essex* and *Southampton* 43 *Eliz.* are cited, which seem to contradict that opinion: the words are, “*That the said earls intended to go to the court where the queen was, and to have taken her into their power, and to have removed divers of her council, and for that end did assemble a multitude of people; this being raised to the end aforesaid was a sufficient overt-act for compassing the death of the queen;*” which seems to contradict what is elsewhere by him said. (p)

And he that shall read the proceeding against the duke of *Norfolk* set forth at large by *Camden Eliz. sub anno 1572. p. 170. & sequentibus*, will find, that not only the conspiring with a foreign prince to invade this kingdom, and signifying it to him by letters, is an overt-act to maintain an indictment for compassing the queen’s death: but that the duke’s purpose to marry the queen of *Scotland* who had formerly laid claim to the crown of *England*, and signifying it by letters, and all this done without the consent of the queen of *England*, was held an overt-act to depose the queen of *England*, and to compass her death; for if the queen of *Scots* claimed the crown of *England*, he, that married her, must be presumed to claim it also in her right, which was not consistent with the safety of the queen of *England*, and her title to the crown; and altho this extending of treason (as to this point of marriage) by illation and consequence was hard (q); yet the duke was convicted and attainted of treason generally upon this indictment, tho there are likewise some other crimes charged in the indictment.

I will therefore set down the resolution of the judges 1663. touching those, that were assembled in *Yorkshire* at *Farley Wood* (r), divers of whom were after indicted, and attainted of high treason for compassing the death of the king:

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the

(p) I do not see how this contradicts what is said by lord *Coke* p. 14. for here was an express design to put the person of the queen under a force; nay it had proceeded farther than a design, for there was a multitude actually assembled for that end. *State Tr. Vol. 1. p. 190.*

(q) According to lord *Coke’s* understanding of the statute of 25 *Edw. 3.* it was not only hard but illegal, for by that statute no one ought to be convicted by inferences or illations. *Co. P. C. p. 12.*

(r) *Kelyng* 19.

the resolution was in these words, as I have transcribed it *verbatim* out of a MS. of my lord keeper *Bridgman* then chief justice of the C. B. who was present at the conference, *Fuit agree per les justices sur conference touchant ceux, queux assemble eux in Farley Wood in Yorkshire 1663, que sur indictment pur compassing mort le roy overt fait poet estre layd in consulting a levyer guerre contre lui (que est overt-act de soy mesme) & actual assembling, & levying guerre: Et ou Co. P. C. 14. dit, " Que conspiracy a levyer guerre nest treason, tan- que soit levyed, & pur ceo nest overt-act, ou manifest prooffe de compassing mort le roy, car le parols sont, (de ceo) i. e. compassing mort le roy, & ceo soit a confounder le several classes, ou membra dividencia: " Uncor le ley est contra; & issint fuit resolve per tous les justices & council de roy in le case des regicides, Venner, Tonge & Vane, (f), qe sur indictment de compassing de mort le roy, consulting a levyer guerre, ou actual assembling de guerre fueront evidence, & overt faits provant compassing mort le roy; & ceo appeirt in Co. P. C. 14. " Si subject conspire ove forein prince de invader le realm, & prepare pur ceo per overt fait, ceo est sufficient overt-act pur mort le roy: Et ibidem p. 12. " Le count de Essex & South' intended daler al court, & daver prise la reigne en lour power, & remover ascun de council, & a ceo fine assembled multitude de people; this being raised for the end afore said fuit sufficient overt-act pur compassing de mort le roy," queux 2 cases sont expresse contrary al primer.*

Fuit auxi agree, que si un overt-act soit lay en le enditement, & le proof est dun autre overt-act de mesme le kinde, ou species de treason, ceo est affets bone evidence.

I must confess, that I could never assent to this last part of the resolution, tho I know it was so practised in criminal cases in the star-chamber, for I have always thought

1. That the overt-act is an essential part of the indictment.
2. As it must be laid, so it must be proved (*t*); for otherwise, if another act than what is laid should be sufficient,

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(f) *Kelyng* 20, 21.

(t) *Kelyng* 8. is *contra*, however this point is pur out of all doubt by 7 *W.* 3. cap. 5. §. 8. whereby it is provided, that

no evidence shall be given of any overt-act, which is not expressly laid in the indictment.

the prisoner would never be provided to make his defence. 3. That more overt-acts than one may be laid in an indictment, and then the proof of any of them so laid, being in law sufficient overt-acts, maintains the indictment. 4. That if any over-act be sufficiently laid in the indictment, and proved, any other overt-acts may be given in evidence to aggravate the crime and render it more probable.

This resolution, as to the point of compassing the king's death, being the latter and of great weight, and more than twice practised (*u*), ought to out-weigh the opinion before cited, and with this agrees the resolution of 13 *Eliz. Dyer* 298. *b.* in *Dr. Storie's* case, who conspired with a foreign prince to invade this realm; it was adjudged an overt-act to make good an indictment of compassing the queen's death (*x*). *Vide Anderson's Reports Placito* 154. which was the case of *Arden* and *Somerville* and others, who conspired the death of queen *Elizabeth*, resolved by all the justices, that a meeting together of these accomplices to consult touching the manner of effecting it was an overt-act to prove it, as well as *Somerville's* buying of a dagger actually to have executed it. *Anderson's Rep. Pars I. p.* 104.

And yet this difference seems to me agreeable to law, and reconciles in some measure both resolutions.

An assembly to levy war against the king, either to depose or restrain, or enforce him to any act, or to come to his presence to remove his counsellors or ministers, or to fight against the king's lieutenant or military commisionate officers,

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(*u*) But yet it does by no means follow from thence, that this resolution is right as to this point any more than as to the other resolved at the same time, which yet our author thinks to be wrong; were it a point of common law the repeated resolutions of the judges is the only way to know what the law is, but where the question arises upon an act of parliament, that is to be the rule for courts of justice to go by, of which they are to judge according to their own reason and understanding, and are not in such case tied down by former determinations any farther than the reasons or arguments thereof appear conclusive, for *judicandum est legibus non ex-*

emplis. Co. P. C. 6. in margine. A bare conspiracy to levy war is certainly not treason, and was so adjudged in the case of *Sir John Friend*; but if it appear upon evidence, that the design was to kill the king, or depose him or imprison him, or put any force on him, and the levying war was only the way or method made use of to effect that design, then it will be an overt-act of compassing the death of the king; and this is the distinction taken by lord chief justice *Holt* in *Sir John Friend's* case, *State Tr. Vol. IV. p.* 613, 614.

(*x*) See 2 *Vent.* 315.

cers, is an overt-act proving the compassing of the death of the king; for such a war is directed against the very person of the king, and he, that designs to fight against the king, cannot but know at least it must hazard his life; such was the case of the earl of *Essex* and some others.

But if it be a levying of a war against the king merely by interpretation and construction of law, as that of *Burton* (y), and others to pull down all enclosures, and that of the apprentices in *London* lately, to pull down all bawdy-houses (z), *de quibus infra*, this seems not to be an evidence of an overt-act to prove compassing the king's death, when it is so disclosed upon the proof, or if it be so particularly laid in the indictment; tho' *prima facie* if it be barely laid as a levying war against the king in the indictment, it is a good overt-act to serve an indictment of compassing the king's death, till upon evidence it shall be disclosed to be only to the purpose aforesaid, and so only an interpretative or constructive levying of war. And *Burton's* case 39 *Eliz.* seems to intimate as much, because they took him to be indictable only upon the statute of 13 *Eliz. cap. 1.* for conspiring to levy war against the queen, whereas if this had been an overt-act to prove the compassing of the death of the king, the fact had been treason within 25 *E. 3.* as surely it would have been, if he had conspired to have raised a war directly against the king or his forces, and assembled people for that purpose, tho' no actual war had been caused by him.

But such a levying of war may in process of time rise into a direct war against the king; as if the king send his forces to suppress them, and they fight the king's forces; and then it may be an overt-act to prove the compassing of the king's death.

And thus far of compassing the *king's* death.

Something I shall add touching the compassing of the death of the *queen*, or *prince*, wherein I shall first consider, what shall be said *the queen*, or *their eldest son* within this act. 2. What a compassing of their death.

I. A queen dowager, namely the queen after the death of her husband, is not a queen within this act, for tho she bear the title of queen, and hath many prerogatives answering the dignity of her person, yet she is not (*his queen*) or, as the other parts of the act express it, (*his companion*) it must be the queen consort, the king's wife, and during the marriage between them.

2. The queen divorced from the king *a vinculo matrimonii*, as for cause of consanguinity, is not a queen within this act, tho the king be living: this was the case of queen *Katharine*, who was first married to prince *Arthur*, and by him, as was said, carnally known, and after his death married to prince *Henry*, (afterward king *Henry VIII.*) by whom she had issue *Mary*, (afterward queen of *England*) and afterwards after twenty years marriage was divorced *causâ affinitatis*, which divorce was confirmed in the parliament 25 *H. 8. cap. 22.*

This was also the case of his second wife queen *Anne*, who was also divorced *a vinculo*, and that divorce confirmed by the statute of 28 *H. 8. cap. 7.* which nevertheless was again repeal'd in part by the statute of 35 *H. 8. cap. 1.* and in effect wholly by the statute of 1 *Eliz. cap. 3.* and yet there is one clause observable in the act of 28 *H. 8.* that treasons committed against queen *Anne*, or the lady *Elizabeth* her daughter, mesne between the marriage and that divorce were punishable, altho the divorce made a nullity of the marriage; and therefore there is a special clause to pardon all such treasons, so that the relation of the divorce, and separation to dissolve the marriage *ab initio*, was not thought sufficient to discharge those treasons, without a special pardon discharging the treasons committed against them.

But we need not put the case of a divorce *a mensâ & thoro causâ adulterii*, because adultery by the king's wife is high treason in her, and so the case of a divorce cannot well come in question, for she must be executed for treason. *P. 28 H. 8. Spilman's Rep. (a). 33 H. 8. cap. 21. (b). Co. P. C. p. 9.*

II. *Ou lour fitz eigne & heir.*

At common law compassing the death of any of the king's children, and declaring it by overt-act was taken to be treason, *Briton, ubi supra*; but by this act it is restrained to *the eldest son and heir.*

1. *The eldest son and heir* extends not to a collateral heir, tho declared heir apparent to the crown, unless there be a special provision for that purpose by act of parliament: thus *Roger Mortimer* 11 R. 2. *Richard* duke of *York* 39 H. 6. *John de la Poole* tempore R. 3. and *Henry* marquis of *Exeter* tempore H. 8. were declared heirs apparent of the crown; yet compassing any of their deaths in the king's life-time was not treason within this act. *Co. P. C.* 8, 9.

And therefore in that great agreement made in the parliament of 39 H. 6. when *Richard* duke of *York* made his claim to the crown, and it was enacted, that H. 6. should hold the crown during his life, and that *Richard* duke of *York* should succeed him, *Rot. Parl.* 39 H. 6. n. 24. it is specially enacted, that if any person do compass or imagine the death of the duke, and thereof be attaint by open act, it shall be high treason; which had not been so, unless it had been specially enacted.

2. The king takes wife, and by her hath issue two sons, the eldest dies, the wife dies, he takes a second wife; this second son, tho he were once not eldest, and tho he be not *lour eigne fitz*, but only the king's son, is eldest son within this statute.

3. King *Edward* III. had issue the *Black Prince*, who had issue *Richard* of *Burdeaux* afterwards king *Richard* II. his eldest grandchild, tho he were not, in the life of his father the *Black Prince*, the king's eldest son within this statute, yet his father being dead in the life of *Edward* III. it may be very considerable whether prince *Richard* be the king's eldest son within this statute, and the compassing of his death be high treason; for he is heir apparent of the crown, and his heirship cannot be devested by any after-born child.

The duchy of *Cornwall* was settled upon the *Black Prince*.
& ipsius & heredum suorum regum Angliæ filiis primogenitis;

altho the king's eldest daughter be not duchess of *Cornwall*, because not *filius*, yet, (contrary to the opinion delivered in the prince's case 8 *Co. Rep.* 30. *a.*) *H.* 8. after the death of his brother prince *Arthur*, and our late king *Charles*, after the death of his eldest brother prince *Henry*, were dukes of *Cornwall* in the life of their fathers: the latter appears expressly by the statute of 21 *Jac. cap.* 29. wherein it is so declared by judgment of parliament; and *Richard* of *Burdeaux* was also duke of *Cornwall* after the death of his father the *Black Prince*, and comes in the catalogue of dukes of *Cornwall* in the collection of *Vincent* and *Mills* of the nobility of *England*; and had the revenues thereto belonging, as appears undeniably. *Rot. Parl.* 51 *E.* 3. *n.* 65.

But it seems it was not by virtue of that limitation in the grant to the *Black Prince*, but by a new special creation; for *Rot. Parl.* 50 *E.* 3. *n.* 50. the commons petition, that he might be created duke of *Cornwall*, earl of *Chester*, and prince of *Wales*; the king declined the doing of it at their request, as being a thing proper only for the king to do his pleasure therein: the truth is, the king had done it before the request made, *viz.* *Rot. Cart.* 47, 48 & 49 *E.* 3. *n.* 10. the words of the charter are, “*Ex consilio & consensu prelatorum, ducum, comitum & baronum, ipsum Ricardum principem Walliæ, ducem Cornubiæ, & comitem Cestriæ fecimus & creavimus*”, and grants him the possessions thereto belonging, which he accordingly enjoyed: *vide Rot. Parl.* 51 *E.* 3. *n.* 9. and observe a certain estate is limited by the patent of creation for life; or otherwise, it seems, it was thought fit to leave it to the construction of law, whether he had it purely by new creation, or by the construction of the charter 11 *E.* 2. to the *Black Prince*.

This case therefore touching conspiring the death of such a prince, as *Richard* of *Burdeaux* then was, tho it may be probable to be treason within the intent of this act, is fittest to be first decided by parliament according to the caution used in the statute of 25 *E.* 3.

3. If the king of *England* hath two daughters only, and no son, the eldest daughter is not within the words or intent

of the *king's eldest son* within this clause, for a son may be after born; but several statutes have made temporary provisions in this case: *vide* the statutes of 25 H. 8. cap. 22. 28 H. 8. cap. 7.

It is true the implication of Co. P. C. p. 9. where it is said, "If the heir apparent be collateral heir apparent, he is not within this statute, until it be declared by parliament," implies that the lineal heir, male or female, is within this statute.

But the implication of the statute itself is against it, because this act almost in the same breath takes notice of the king's eldest daughter upon another rank of treason, namely defiling her; and it is not safe to extend this act by construction.

The second daughter, living the first, is certainly not within this law, because not immediately inheritable to the crown.

Yet by the statute of 25 H. 8. cap. 22. which was but temporary, provision is made, that if any thing should be written or done to the peril, slander or disherison of any of the Issues and heirs between him and queen *Anne*, the same should be treason.

Thus far touching the persons of the queen or prince.

Now what shall be said a compassing of their death, or an overt-act to prove the same: what shall be said a compassing of the king's death, hath been at large declared, much whereof may be applied to the queen or prince, but not universally; for the king is above the coercion of the law, tho his actions are not exempted from the direction of the law in many cases; but the queen and prince are subjects of the king, and subjects to the laws; whence it comes to pass, that there are certain overt-acts manifesting compassing the king's death, which are specific and appropriate to the king and his sovereign power and royal dignity, which are not applicable to the queen or prince.

If a man compass to imprison the king, tho it be colourably done by process of law, it is a compassing of the king's death within this act, as hath been shewn.

But if the queen or prince commit a misdemeanor of such a nature, as is a contempt against the king's laws, to which
imprisonment

imprisonment is proper; as in case of treason, felony, rescue, they may be imprisoned by process of law without danger of treason: thus was the son of *Henry IV.* committed by *Gascoign* chief justice for rescuing a prisoner from the bar; and several acts of attainder of treason have passed in parliament against some queen-consorts, as appears by 28 *H. 8. cap. 7.* 33 *H. 8. cap. 21.* against queen *Catharine Howard.* *Rot. Parl. 5 H. 5. n. 11.*

Again, to compass to depose the king is treason, but to compass a divorce between the king and queen by the king's commission by due process of law was no treason, as appears in the process before the archbishop of *Canterbury*, whereupon queen *Catharine*, and afterwards queen *Anne* were divorced.

The compassing therefore of the death of the queen or prince, which is treason within this act, is where a man without due process of law expressly compasseth the wounding or death of them either by force or poison.

And thus much for treason in compassing the death of the king, queen, or prince; and because the next treason declared, namely the violation of the king's wife, the king's eldest son's wife, the king's eldest daughter, hath not much to be said concerning it, I shall close this chapter with it.

1. *The violating the king's companion*, that is the king's wife, the queen consort, her husband being now living; this is high treason, and so it is in her if she consent. *P. 28 H. 8. 33 H. 8. cap. 21. Co. P. C. p. 9.*

2. *The wife of the king's eldest son and heir*, a princess consort, and during the coverture between them; and if she consent, it is treason in her.

3. *The king's eldest daughter not married*: this extends to a second daughter, the eldest being dead; for she is now eldest, and, for want of issue male, inheritable to the crown; but at common law this treason extended to any of the daughters. *Briton, cap. 22. §. 71.* It extends to an eldest daughter, tho' there be sons; and *quere*, whether to an eldest daughter, that hath been married, and is now a widow, *nient marry* may be construed either way; or if it doth, yet whether it

extends to an eldest daughter, that is a widow, and hath children by her husband; the words of the old books are *avant ceo; quel est marry*: it seems, that if the eldest daughter hath been once married, she is not within this law, because of the words *nient marry*, tho the reason may possibly be the same; and it seems, tho there be sons, yet the violating of the king's eldest daughter, being within the express words of the law, the violation of her is within this law, because within the words; and yet the violation of the wife of the king's second son is not within this statute, yet he and his issue is inheritable to the crown before the eldest daughter; in this case therefore the words of the law are to govern.

Altho it should seem probable, that the eldest son of the prince after the death of his father may be the king's eldest son within this act, as is before observed; yet the daughter of the king's eldest daughter, after her mother's death, seems not an eldest daughter within this act, her grandfather being living, for the grandson, who is heir apparent of the crown, is of more consideration than the daughter of a daughter, who cannot be heir apparent, because a son may be born.

Quere, whether violating the eldest daughter, after the death of the king her father, be treason within this act, where a son succeeds to the crown: it seems not, for the relation is ceased. (c)

And thus far for the two first branches of high treason.

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(c) She is no longer *leigne-fille le roy*. It having been before observed that a queen regent is a king within this act, it follows of course that the eldest son and the eldest daughter of such a queen is likewise within it. *Co. P. C. p. 8.*

C H A P. XIV.

Concerning levying of war against the king.

THE *jus gladii*, both military and civil, is one of the *jura majestatis*, and therefore no man can levy war within this kingdom without the king's commission. *Co. P. C.* p. 9. See the statute, or rather proclamation (a) *de defensione portandi arma*, wherein it is recited by the king, that the prelates, earls, barons, and commonalty *illoque assembles en avisement sur cest besoigne nous eiont dit, que a nous appent & de nous par nostre royal seignorie defendre fortment des armes, & de tout autre force contre nostre pees, a tous les foitz, que nous plerra (b)*; and hence it is in all declarations and indictments touching things done against the peace, the conclusion goes *contra pacem domini regis*.

It is true, there have been great disputes in this kingdom touching the disposition of the *militia* of this kingdom, which are now all settled, and declared to be the right of the crown by the statutes of 13 *Car. 2. cap. 6.* and 13 & 14 *Car. 2. cap. 3.*

Now as to this clause of high treason, *Ou si home levy guerre countre nostre seigneur le roy en son realme.*

To make a treason within this clause of this statute there must be three things concurring.

- I. It must be a *levying of war*.
- II. It must be a *levying of war against the king*.
- III. It must be a *levying of war against the king in his realm*.

1. For the first of these, the act saith *levy guerre*; what shall be said a *levying of war*, is in truth a question of fact, and

(a) In the seventh year of *Edward I.* tion against coming armed to the parliament. *Vide Rot. Parl. 25 E. 3. pars. 1. n. 58. dorso.*
 (b) This statute is only a proof of the king's power to issue his proclama-

and requires many circumstances to give it that denomination, which may be difficult to enumerate or to define; and commonly is expressed by the words *more guerrino arraiati*.

As where people are assembled in great numbers armed with weapons offensive, or weapons of war, if they march thus armed in a body, if they have chosen commanders or officers, if they march *cum vexillis explicatis* or with drums or trumpets, and the like; whether the greatness of their numbers, and their continuance together doing these acts may not amount to *more guerrino arraiati*, may be considerable.

But a bare conspiracy or consultations of persons to levy a war, and to provide weapons for that purpose; this, tho it may in some cases amount to an overt-act of compassing the king's death, yet it is not a levying of war within this clause of this statute; and therefore there have been many temporary acts of parliament to make such a conspiracy to levy war treason during the life of the prince, as 13 *Eliz. cap. 1.* 13 *Car. 2. cap. 1.* and others. *Vide accordant Co. P. C. p. 10.*

Again, the actual assembling of many rioters in great numbers to do unlawful acts if it be not *modo guerrino* or *in specie belli*, as if they have no military arms, nor march or continue together in the posture of war, may make a great riot, yet doth not always amount to a levying of war: *vide* statute 3 & 4 *E. 6. cap. 5.* 1 *Mar. cap. 12. (c)*

II. As to the second; the statute saith, (*against us*) to make it therefore treason, it must be a levying of war against the king; otherwise, tho it be *more guerrino*, and a levying of war, it is not treason. 1. Therefore if it be upon a private quarrel, as many times it happend between lords marchers, tho it be *vexillis explicatis*, it seems no levying of war against the king. 2. If it be only upon a private and particular design, as to pull down the inclosures of such a particular common, it is no levying of war against the king. *Co. P. C. p. 9.* 3. But a war levied against the king is of two sorts, 1. Expressly and directly, as raising war against the king or his general and forces, or to surprize or injure the king's person,

or

(c) See also 1 *Geo. 1. cap. 5.*

or to imprifon him, or to go to his prefence to enforce him to remove any of his minifters or counfellors, and the like. 2. Interpretatively and conſtructively, as when a war is levied to throw down incloſures generally, or to inhanſe ſervants wages, or to alter religion eſtabliſhed by law; and many inſtances of like nature might be given; this hath been reſolved to be a war againſt the king, and treaſon within this claufe; and the conſpiring to levy ſuch a war is treaſon, tho not within the act of 25 E. 3. yet by divers temporary acts of parliament, as 13 *Eliz.* during the queen's life, 13 *Car.* 2. during our king's life. *Co. P. C.* p. 10.

The firſt reſolution, that I find of this interpretative levying of war, is a reſolution cited by my lord *Coke*, *P. C.* p. 10. in the time of *Henry VIII.* for inhanſing ſervants wages; and the next in time was that of *Burton*, 39 *Eliz.* *Co. P. C.* p. 10. (d) for raiſing an armed force to pull down incloſures generally: this is now ſettled by theſe inſtances, and ſome of the like kind hereafter mentiond; the proceeding againſt *Burton* and his companions was not upon the ſtatute of 25 E. 3. which required, that in new caſes the parliament ſhould be firſt conſulted; but upon the ſtatute of 13 *Eliz.* for conſpiring to levy war, which hath not that claufe of conſulting the parliament in new caſes, and therefore ſeems to leave a latitude to the judges to make conſtruction greater, than that was left by the ſtatute of 25 E. 3.

Theſe reſolutions being made and ſettled we muſt acquieſce in them; but in my opinion, if new caſes happen for the future, that have not an expreſs reſolution in point, nor are expreſly within the words of 25 E. 3. tho they may ſeem to have a parity of reaſon, it is the ſafeſt way, and moſt agreeable to the wiſdom of the great act of 25 E. 3. firſt to conſult the parliament and have their declaration, and to be very wary in multiplying conſtructive and interpretative treaſons, for we know not where it will end.

But particular inſtances will beſt illuſtrate this whole learning, which I ſhall ſubjoin, tho ſomewhat promiſcuouſly, as they occur to my memory.

A conspiring or compassing to levy war is not a levying war within this act, unless the war be levied; this appears *Co. P. C. p. 9.* and also by those many acts of parliament above-mentiond, which were but temporary and limited to continue during the life of the king or queen, whereby it is specially enacted, that such compassing to levy war shall be treason; which needed not have been, if it had been treason by the statute of 25 E. 3. *Vide 1 & 2 P. & M. cap. 10. 1 Eliz. cap. 5. 13 Eliz. cap. 1. 13 Car. 2. cap. 1.*

And therefore in the case of *Robert Burton* and others, that conspired to assemble themselves and pull down inclosures, and to gain arms at the lord *Norris's* house, and to arm themselves for that purpose. *Co. P. C. 10.* they were indicted and attainted purely upon the statute of 13 *Eliz. cap. 1.* whereby conspiring to levy war is made treason.

But if divers conspire to levy war, and some of them actually levy it, this is high treason in all the conspirators, because in treason all are principals, and here is a war levied. (e)

If divers persons levy a force of multitude of men to pull down a particular inclosure, this is not a levying of war within this statute, but a great riot; but if they levy war to pull down all inclosures, or to expulse strangers, or to remove counsellors, or against any statute, as namely the statute of *Labourers*, or for inhanfing salaries and wages, this is a levying war against the king, because it is generally against the king's laws, and the offenders take upon them the reformation, which subjects by gathering power ought not to do. *Co. P. C. p. 9, 10. Vide the act 3 & 4 E. 6. cap. 5.* " If any
 " to the number of twelve shall intend, go about, practise
 " or put in ure by force to alter the religion established by
 " law, or any other laws, and depart not within an hour af-
 " ter proclamation, or after that shall wilfully in a forcible
 " manner attempt to put in ure the things above specified,
 " then it is high treason."

If men levy war to break prisons to deliver one or more particular persons out of prison, wherein they are lawfully imprisoned,

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imprisoned,

imprisoned, unless such as are imprisoned for treason; this upon advice of the judges upon a special verdict found at the *Old Bailey* was ruled not to be high treason, but only a great riot 1668. but if it were to break prisons, or deliver persons generally out of prison, this is treason. *Co. P. C. p. 9.*

There was a special verdict found at the *Old Bailey* anno 20 *Car. II. (f)*, that *A. B. and C.* with divers persons to the number of an hundred assembled themselves *modo guerrino* to pull down bawdy-houses, and that they marched with a flag upon a staff and weapons, and pulled down certain houses in prosecution of their conspiracy; this by all the judges assembled, except one *(g)*, was ruled to be levying of war, and so high treason within this statute; and accordingly they were executed.

But the reason that made the doubt to him that doubted it, was 1. Because it seemed but an unruly company of apprentices, among whom that custom of pulling down bawdy-houses had long obtained, and therefore was usually repressed by officers, and not punished as traitors. 2. Because the finding to pull down bawdy-houses, might reasonably be intended two or three particular bawdy-houses, and the indefinite expression should not *in materiâ odiosâ* be construed either universally or generally. And 3. Because the statute of 1 *Mar. cap. 12.* tho now discontinued, makes assemblies of above twelve persons and of as high a nature only felony, and that not without a continuance together an hour after proclamation made; as namely an assembly to pull down bawdy-houses, barn mills or bays, or to abate the rents of any manors, lands or tenements, or the price of victuals, corn or grain; or if any person shall ring a bell, beat a drum or sound a trumpet, and thereby raise above the number of twelve for the purposes aforesaid, which are raised accordingly and do the fact, and dissolve not within an hour after proclamation, or that shall convey money, harness, artillery, it is enacted to be felony; and if any above the number of two, and under twelve, do practise with force of arms unlawfully, and of their own authority to kill any of the

(f) Vide *Kelyng* p. 70, &c. *(g)* This was our author himself. Vide *Kelyng* 75.

queen's subjects, to dig up pales, throw down inclosures of parks, pull down any house, mill, or burn any stack of corn, or abate rents of manors, lands or tenements, or price of corn or victual, and do not depart within an hour after proclamation, and continue to attempt to do or put in ure any of the things above-mentioned, they are to have a year's imprisonment.

And the statute of 3 & 4 E. 6. *cap.* 5. is to the same purpose, only if the number of forty, or above, come together to do such acts as before, or any other felonious, rebellious or traitorous acts, and continue together two hours, it is made high treason. (*b*)

But yet the greater opinion obtaind, as it was fit; and these apprentices had judgment, and some of them were executed as for high treason.

Yet this use may be made of those statutes: 1. That there may be several riots of a great and notorious nature, which yet amount not to high treason. 2. But again, those acts and attempts possibly might not be general, but might be directed only to some particular instances, as for the purpose, not to pull down all houses or mills, but some special ones, which they thought offensive to them; nor to abate the rents of all manors, but of some particular manor, whereof they were tenants; nor to make a general abatement of the prices of victuals or corn, but in some particular market, or within some precinct; and so crosseth not the general learning before given of constructive treason. 3. It seems by that act also, they did not take the bare assembly to that intent to be a sufficient overt-act of levying of war; that was but an attempt and putting in ure, unless they had actually begun the execution of that intention, going about, practising or putting in ure; for this act puts a difference between the same and the doing thereof.

In the parliament of 20 E. 1. now printed in Mr. Ryley, p. 77. it appears there arose a private quarrel between the earls of Gloucester and Hereford, two great lords marchers; and hereupon divers of the earl of Gloucester's party with his consent *cum*
multitu-

(*b*) See also 1 Geo. I. *cap.* 5.

multitudine tam equitum quam peditum exierunt de terra ipsius comitis de Morgannon cum vexillo de armis ipsius comitis explicato versus terram comitis Heref' de Brecknock, & ingressi fuerunt terram illam per spatium duarum leucarum, & illam depraedati fuerunt, & bona illa depraedata usque in terram dicti comitis Glocestriæ adduxerunt, and killed many, and burnt houses and committed divers outrages; and the like was done by the earl of Hereford and his party upon the earl of Gloucester: they endeavoured to excuse themselves by certain customs between the lords marchers; by the judgment of the lords in parliament their royal franchises were seized as forfeited during their lives, and they committed to prison, till ransomed at the king's pleasure.

Altho here was really a war levied between these two earls, yet in as much as it was upon a private quarrel between them, it was only a great riot and contempt, and no levying of war against the king; and so neither at common law, nor within the statute of 25 E. 3. if it had been then made, was it high treason.

It appears by *Walsingham sub anno 1403.* a great rebellion was raised against Henry IV. by Henry Percy son of the earl of Northumberland and others: the earl gathered a great force, and actually took part with neither, but marched with his force, as some thought, towards his son, and, as others thought, towards the king *pro redintegrando pacis negotio*; he was hindered in his march by the earl of Westmoreland and returned to his house at *Werkworth*; the king had the victory; the earl petitioned the king; the whole fact was examined in parliament, *Rot. Parl. 5 H. 4. n. 12.* The king demanded the opinion of the judges and his counsel touching it: the lords protest the judgment belongs in this case to them; the lords by the king's command take the business into examination, and upon view of the statute of 25 E. 3. and the statute of Liveries "*Adjugerent, qe ceo, qe fuit fait par le counte, nest pas treason, ne felony, mes trespasss tantsolement, pur quel trespass le dit counte deust faire fine & ransom a volunte du roy;*" but Henry the son was attaint of treason.

It appears not what the reason of that judgment was; whether they thought it only a compassing to levy war, and no war actually levied by him, because not actually joined with his son; or whether they thought his intention was only to come to the king to mediate peace, and not to levy a war, nor to do him any bodily harm; that it was indeed an offense in him to raise an army without the king's commission, but not an offense of high treason; because it did not appear that he raised arms to oppose the king, but possibly to assist him; but whatever was the reason of it, it was a very mild and gentle judgment, for the earl was doubtful of a more severe judgment: *nota*, he returns thanks to the lords and commons *de leur bone & entyre coers a lui monstre*, and thanks the king for his grace.

The clause in the statute of 25 E. 3. *If any man ride armed covertly or secretly with men of arms against any other to slay, rob, or take him, or to detain him, till he hath made fine or ransom, or have his deliverance, it is not in the mind of the king or his council, that in such case it shall be judged treason; but shall be judged felony or trespass according to the laws of the land of old times used, and according as the case requireth; and if in such case or other like (i) before this time any judges have judged treason, and for this cause the lands and tenements have come to the king's hands as forfeited, the chief lords of the fee shall have the escheat.*

This declares the law, that a riding armed with men of arms upon a private quarrel or design against a common person is not a levying of war against the king (k); and the especial reason of the express adding of this clause seems to

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(i) *Vide simile H. 26. E. 3. coram rege, Rot. 30. Rex. Hale.*

This case was in the county of *Essex*, and was no more than this; Sir *John Fitzwauter* and *William Baltrip* his steward, &c. were presented by juries of divers hundreds for taking men by force, and detaining them till they paid fines for their ransom, for exacting and extorting money from others, and for several great and enormous riots, misdemeanors and trespasses in the county

of *Essex*, attractando sibi regalem potestatem, upon which Sir *John Fitzwauter* surrendered himself, and was committed to the *Tower of London*, and *Baltrip* was outlawed, who afterwards pleaded the king's pardon *pro felonis, conspiratione, manutentionia & transgressionibus predictis, necnon pro utlagariis occasione præmissorum in ipsum promulgatis*, upon which he was discharged *sine die*.

(k) *Co. P. C. p. 10.*

be in respect of that judgment of treason given against Sir *John Gerberge*, *Trin.* 21 *E.* 3. *Rot.* 23. *Rex.* and at large before mentiond, *chap.* 11. which judgment is in effect repeald by this act.

It appears by Sir *F. Moore's Rep. n.* 849. (1), the earl of *Essex* was arraigned and condemned for high treason before the lord high steward, whereupon it was resolved by the justices, 1. That when the queen sent the lord keeper of the great seal (*m*) to him, commanding him to dismiss the armed persons in his house and to come to her, and he refused to come, and continued the arms and armed persons in his house, that was treason. 2. That when he went with a troop of captains and others from his house into the city of *London*, and there prayed aid of the citizens in defense of his life, and to go with him to the queen's court to bring him into the queen's presence with a strong hand, so that he might be powerful enough to remove certain of his enemies, that were attendant on the queen, this was high treason, because it tends to a force to be done upon the queen, and a restraint of her in her house; and the fact in *London* was actual rebellion, tho he intended no hurt to the person of the queen. 3. That the adherence of the earl of *Southampton* to the earl of *Essex* in *London*, tho he did not know of any other purpose than of a private quarrel, which the earl of *Essex* had against certain servants of the queen, was treason in him, because it was a rebellion in the earl of *Essex*. 4. That all they, that went with the earl of *Essex* from *Essex*-house to *London*, whether they knew of his intent or not, were traitors, whether they departed upon the proclamation or not; but those, that suddenly adhered to him in *London*, and departed upon the proclamation made, were within the proclamation to be pardoned: there were other points resolved touching the manner of his trial, whereof hereafter.

The whole history of *Essex* his treason and the proceeding thereupon is set forth at large by *Camden anno* 44 *Eliz.* p. 604. & *sequentibus*, wherein the charge of his indictment appears to be, that he and his accomplices had conspired to deprive the

the queen of her crown and life, having consulted to surprize the queen in the court; and that they had broken out into open rebellion by imprisoning the counsellors of the realm, by stirring up the *Londoners* to rebellion by tales and fictions, by assaulting the queen's faithful subjects in the city, and defending the house against the queen's forces; so that the great part of the indictment was compassing the queen's death, and the rest of the charge were the overt-acts, which was treason within the statute of 25 E. 3. with which my lord Coke agrees, *P. C. p. 12.*

If divers persons levy war against the king, and others bring them relief of victuals *pro timore mortis*, & *recesserunt quam citò potuerunt*, this was adjudged not to be a levying of war, because *pro timore mortis*; *quare*, if the same law be in case of marching with them in their company for fear of death. *Co. P. C. p. 10. vide sup. cap. 8. Mich. 21 E. 3. Rot. 101. Linc. coram rege. Illi, qui coacti fuerunt ad denarios recipiendos & similiiter coacti juraverunt, dimittuntur per curiam per manucaptionem, quia sic in personis ipsorum nihil mali reperitur*, in case of a great riot, not unlike a levying of war, for which they were indicted of treason.

Rot. Par. 17 R. 2. n. 20. upon the complaint of the dukes of *Aquitain* and *Gloucester*, shewing that *Thomas Talbot* and others his adherents by confederacy between them *fauxment conspirerent pur tuer les dits ducs uncles le roy & autres persones grants de realme, & pur accomplier le malice susdit le dit Thomas & les autres mistrent tout leur poyar, come notoirement est conus, & le dit Thomas ad en grand party confesse, en antiement des estats & de loys de vostre realme, & sur ceo firent divers gents lever armes, & arrayes a feire de guerre en assemblees & congregations a tres grant & horrible number en divers parties en les countie de Cestre*, and pray that it may be declared in this parliament the nature, pain and judgment of this offense: the conclusion whereof was thus;

“ *Est avys au roy & a les seigniors de cest parlement en droit*
“ *de mesme la bille touchant Thomas Talbot, que la matter con-*
“ *tenus en la dite bill est overt & haut treason, & touche la*
“ *person du roy & tout son realme, & pur treason le roy &*
“ *touts*

“ *touts les seigneurs susdits adjuggent & declarant ;*” and thereupon writs of proclamation for his appearance in the king’s bench are ordered to issue for his appearance in one month, or otherwise to be attaind of treason (*n*): *vide Pasf. 17 R. 2. B. R. Rot. 16. Rex.* Writs of proclamation issued accordingly to the sheriffs of *Yorkshire* and *Derbyshire*, and the sheriffs returned *non est inventus* ; *Talbot* afterwards came and rendered himself, and was committed to the *Tower*, and afterwards a *Supersedeas* came for his enlargement. (*o*)

But this declaration being only by the king and house of lords is not a conclusive or a sufficient declaration of treason according to the purview of this statute, but yet it was a real levying of war against the king, because done *more guerrino* and by people arrayed *de fet de guerre*, as in *Bensted’s* case hereafter mentiond ; but had it been a bare conspiracy, it had not been treason, as appears by the special statute of 3 *H. 7. cap. 14.* whereby a conspiracy to kill the king without an overt-act, (for then it were treason within the statute of 25 *E. 3.*) or a conspiracy to kill any of his privy council and certain great officers, tho the event followed not, is made felony.

See for instances of very great riots with multitudes of persons *modo guerrino arraiati*, which yet amounted not to high treason, because upon particular quarrels and differences between private persons. *Claus. 5 E. 2. M. 4. inter Griffinum de Pole & Johannem de Cherleton pro castro de Pole. Pat. 8 E. 4. part 1. n. 7. dorf.* between the citizens and bishop of *Norwich* (*p*). *Rot. Parl. 5 R. 2. n. 45.* between the town and university of *Cambridge. Rot. Parl. 11 H. 4. n. 37. & sequentibus*, between *Hugh de Erdeswick* and others touching the castle of *Bothall. Rot. Parl. 13 H. 4. n. 12.* between the lord *Rofs* Sir *Robert Tyrrhyt* touching *Turbary* in *Wroughtly. Rot. Parl. 4*

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(*n*) And all persons, that shall receive the said Sir *Thomas Talbot* within the realm of *England*, after the said month elapsed from the time of the said proclamation, are declared guilty of high treason upon conviction of such harbouring or receiving.

(*o*) The *Supersedeas* was not expressly

for his enlargement, *Sed quod cuicumq; processui versus ipsum Thomam Talbot ex causis predictis ulterius faciendo supersedecant, quousque aliud a rege inde habuerint in mandatis.*

(*p*) This is not to be found among the records.

H. 5. n. 15. between *Robert Whittington* and *Philip Lingdon* and others. *H. 26 E. 3. Rot. 30. Rex. Fitzwater's case.* (q)

All which, tho they were enormous riots, and done *more guerrino*, yet being private and particular quarrels, not much unlike that between the earls of *Gloucester* and *Hereford*; did not amount to high treason, but contempts, riots; or, if death ensued, felony, as the case required.

But going in a warlike manner with drums and arms to surprize the archbishop of *Canterbury*, who was a privy counsellor, it being with drums and a multitude (as the indictment was) to the number of three hundred persons, was ruled treason by all the judges of *England*, and the offenders had judgment accordingly; and at the same time by ten of the judges it was agreed, that the breaking of prison, where traitors were in durance, and causing them to escape was treason, altho the parties did not know that there were any traitors there, upon the case of *1 H. 6. 5. b.* and so to break a prison where felons are, whereby they escape, is felony without knowing them to be imprisoned for such offense. *P. 16 Car. Croke, Thomas Bensted's case.* (r)

The case of *Sir John Oldcastle* for levying of war against the king is entred *Rot. Parl. 5 H. 5. n. 11.*

The twenty-fifth of *September anno domini 1413*, *Thomas* archbishop of *Canterbury* the pope's legate by his sentence definitive declared *Sir John Oldcastle* lord *Cobham* an heretic, especially in the point of the sacrament of the eucharist and penance, excommunicated him, *relinquentes ipsum ex nunc tanquam hereticum iudicio seculari.* (s)

Hill. 1 H. 5. Rot. 7. inter placita regis, Middlesex, there is an indictment against him before certain commissioners of oyer

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and

(q) *Nicholas Brundish* and others to the number of one hundred were sent by *Sir John Fitzwater* armed *platis, gladiis, bokelariis, arcibus & sagittis ad modum guerræ* to seize and take *boves, asinos, &c.* of *Thomas Hubert* in *Herlaxer* upon the lands of the said *Thomas*, *quas tenuit de aliis dominis & nihil de ipso Johanne Fitzwater*; accordingly they did so, and carried them away to ma-

nors belonging to the said *Sir John*; but neither this riot, nor any other the facts, which he or his accomplices were indicted for, were conceived to amount to treason, since none of them were arraigned of more than felony; *vide supra in notis, p. 137.*

(r) *Cro. Car. 583. W. Jones 455.*

(s) *See Stare Tr. Vol. 1. p. 42.*

and *terminer* of *London* and *Middlesex*, returned into the king's bench to this effect: (t)

“ Quod *Johannes Oldecastell* de *Coulyng* in com' *Kanc'* chivaler, & alii lollardi vulgariter nuncupati, qui contra fidem catholicam diversas opiniones hæreticas & alios errores manifestos legi catholicæ repugnantes, a diu est, temerariè tenuerunt opiniones & errores prædictos manutene-
 “ nere, aut in facto minimè perimplere valentes, quam diu regia potestas & tam status regalis domini nostri regis, quàm status & officium prælatiæ dignitatis, infra regnum *Angliæ* in prosperitate perseverarent; falso & proditoriè
 “ machinando tam statum regium quàm statum & officium prælatorum, nec non ordines religiosorum infra dictum regnum *Angliæ* penitus adnullare ac dominum nostrum regem, fratres suos, prælatos & alios magnates ejusdem regni interficere, nec non viros religiosos, relictis cultibus divinis
 “ & religiosis observantiis, ad occupationes mundanas provocare; & tam ecclesias cathedrales, quàm alias ecclesias & domos religiosas de reliquiis & aliis bonis ecclesiasticis totaliter spoliare ac funditus ad terram prosternere, & dictum
 “ *Johannem Oldecastell* regentem ejusdem regni constituere, & quamplura regimina secundum eorum voluntatem infra regnum prædictum, quasi gens sine capite, in finalem destructionem tam fidei catholicæ & cleri, quam status & majestatis dignitatis regalis, infra idem regnum ordinare, falso & proditoriè ordinaverunt & proposuerunt, quòd ipsi insimul cum quampluribus rebellibus domini regis ignotis ad numerum viginti millium hominum de diversis partibus regni *Angliæ* modo guerrino arraiatis privatim insurgerent, & die Mercurii proximo post festum *Epiphaniæ* domini anno regni regis nunc primo apud *Villam* & parochiam sancti *Egidii* extra barram veteris *Templi London* in quodam magno campo ibidem unanimiter convenirent & insimul obviarent pro nefando proposito suo in præmissis
 “ perim-

I

(t) See *State Tr.* Vol. VI. *Appendix* p. 4. *Fox* in his acts and monuments, Vol. I. p. 655. brings several arguments to prove this indictment to be a forged

one; but whatever the indictment was, there is reason sufficient to believe the pretended conspiracy was so. See *Rapin's* history *sub anno* 1414.

“ perimplendo, quo quidem die Mercurii apud *Villam* & pa-
 “ rochiam prædictas prædicti *Johannes Oldecastell* & alii in hu-
 “ jusmodi proposito proditorio perseverantes prædictum do-
 “ minum nostrum regem, fratres suos, viz. *Thomam* ducem
 “ *Clarenciæ*, *Johannem* de *Lancastre*, & *Humfridum* de *Lan-*
 “ *castre*, nec non prælatos & magnates prædictos interficere,
 “ nec non ipsum dominum nostrum regem & hæredes
 “ suos de regno suo prædicto exhæredare, & præmissa omnia
 “ & singula, nec non quamplura alia mala & intolerabilia
 “ facere & perimplere, falso & proditoriè proposuerunt
 “ & imaginaverunt, & ibidem versus campum prædictum
 “ modo guerrino arraiati proditoriè modo insurrectionis con-
 “ tra ligeantias suas equitaverunt ad debellandum dictum do-
 “ minum nostrum regem, nisi per ipsum manu forti gratiosè
 “ impediti fuissent, quod quidem indictamentum dominus
 “ rex nunc certis de causis coram eo venire fecit terminan-
 “ dum——Per quod præceptum fuit vic’ quod non omitte-
 “ ret, &c. quin caperet præfatum *Johannem Oldecastell*, si, &c.
 “ & salvo, &c.” upon this indictment removed into the king’s
 bench he was outlawed.

All this record and process at the request of the commons was removed into parliament, and in the presence of the *custos regni*, lords, and commons was read, and expounded in *English* to Sir *John Oldcastle*, and it was demanded what he could say why execution should not be done upon him upon that utlary; and he saying nothing in his excuse “ *pur*
 “ *que agard est en mesme le parlement per les seigneurs avant*
 “ *dits, de l’assent de le dit gardein, & a la pryer suisdit, qe le*
 “ *dit John, come traytour a dieu & heretique notoirement ap-*
 “ *prove & adjudge, come peirt per un instrument l’archevesque*
 “ *consue ala dors de cest roll, & come traytour a roy & a son*
 “ *roialme, soit amesne a la Tower de Londres, & d’illoques soit*
 “ *treins per my le city de Londres, tanque as novel furches en*
 “ *le paroche de St. Giles hors de la barre de viel Temple de*
 “ *Londres, & illoques soit pendus, & ars pendant.* (u)

How

(u) The author of the trial of Sir *John Oldcastle* says, that this sentence was in pursuance of an act of parliament, which appointed that punishment in those cases. See *State Tr.* Vol. I. p. 49.

How this nobleman was pursued by the ecclesiastics, and the whole story is set down by *Walsingham*.

That which I observe in it is, 1. That the indictment is principally founded upon that article of this statute of compassing the king's death, and yet the overt-act is an assembly to levy war, and actual levying of war. 2. Altho this indictment is not expressly upon this clause of levying of war, for that is not the principal charge of the indictment, but compassing the king's death, yet the marching with a great army to *St. Giles's modo guerrino arraiati* was an express levying of war, tho there were no blow yet struck. But 3. it seems their first meeting to contrive their coming to *St. Giles's*, tho it might be an overt-act to compass the king's death, and so treason within the first clause of the statute, yet was not an actual levying of war, and so not treason within that clause of the statute; but their actual marching in a body *modo guerrino & modo insurrectionis* might be a levying of war within the statute. 4. That actual levying of war, tho it be a treason, upon which *Oldcastle* might have been indicted, yet it was also an overt-act to serve an indictment for compassing the king's death, as hath been shewed at large before.

If there be an actual rebellion or insurrection, it is a levying of war within this act; and by the name of levying of war it must be expressed in the indictment. *Co. P. C. p. 10.*

And in *Anderson's Rep. part 2. n. 2.* after *Trinity-term 37 Eliz. (x)* before the two chief justices, master of the rolls, baron *Clerk* and *Ewens*, the case was, that divers apprentices of *London* and *Southwark* were committed to prison for riots, and for making proclamation concerning the prices of victuals, some whereof were sentenced in the star-chamber to be set in the pillory and whipt; after which divers other apprentices and one *Grant* of *Uxbridge* conspire to take and deliver those apprentices out of ward, to kill the mayor of *London*, and to burn his house, and to break open two houses near the *Tower*, where there were divers weapons and arms for three hundred men, and there to furnish themselves with weapons; after which divers apprentices devised libels, moving others to take

part with them in their devices, and to assemble themselves at *Bun-hill* and *Tower-hill*; and accordingly divers assembled themselves at *Bun-hill*, and three hundred at the *Tower*, where they had a trumpet, and one that held a cloke upon a pole in lieu of a flag, and in going towards the lord mayor's house the sheriffs and sword-bearer with others offered to resist them, against whom the apprentices offered violence.

And it was agreed by the judges referees, that this was treason within the statute of 13 *Eliz.* for intending to levy war against the queen; for they held, that if any do intend to levy war for any thing, that the queen by her laws or justice ought or may do in government as queen, that shall be intended a levying of war against the queen; and it is not material, that they intended no ill to the person of the queen, but if intended against the office and authority of the queen, to levy war, this is within the words and intent of the statute, and hereupon *Grant* and divers others were indicted and executed.

And *eadem libro n. 49. (y)* the case of *Burton* mentioned by my lord *Coke, P. C. p. 10.* is reported, *viz.* in the county of *Oxford* divers persons conspire to assemble themselves, and move others to rise and pull down inclosures, and to effect it they determined to go to the lord *Norris's* house and others, to take their arms, horses and other things, and to kill divers gentlemen, and thence to go to *London*, where they said many would take their parts; and this appeared by their confessions: and it was agreed, 1. That this was treason within the statute of 13 *Eliz.* for conspiring to levy war against the queen. 2. But not within the statute of 25 *E. 3.* because no war was levied, and that statute extended not to a conspiracy to levy war.

Nota; in both these cases there was a conspiring to arm themselves as well as to assemble, which had they effected and so assembled *more guerrino*, it had been a war levied, and by construction and interpretation a war levied against the queen.

P p

If

If any with weapons invafive or defensive doth hold and defend a caſtle or fort againſt the king and his power, this is a levying of war againſt the king within this a^ct. *Co. P. C. p. 10.* *Vide* the ſtatute 13 *Eliz. cap. 1.* & *dicta ibid. poſtea.*

There is a great difference between an inſurrection upon the account of a civil intereſt and a levying of war.

A. recovers poſſeſſion againſt *B.* of a houſe, &c. in a real a^ction, or in an *ejectione firme*, and a writ of ſeiſin or poſſeſſion goes to the ſheriff, *B.* holds his houſe againſt the ſheriff with force, and aſſembles perſons with weapons for that purpoſe, who keep the houſe with a ſtrong hand againſt the ſheriff, tho' aſſiſted with the *poſſe comitatus*: this is no treason either in *B.* or his accomplices, but only a great riot and miſdemeanor; the like is to be ſaid touching a man that keeps poſſeſſion againſt a reſtitution upon an indictment of forcible entry.

But if *B.* either fortifies his own houſe or the houſe of another with weapons defensive or invaſive purpoſely to make head againſt the king and to ſecure himſelf againſt the king's regal army or forces, then that is a levying of war againſt the king.

But the bare detaining of the king's caſtles or ſhips ſeems no levying of war within this ſtatute: *vide infra* 13 *Eliz. cap. 1.* & *dicta ibidem.*

If the king's lieutenant in a time of hoſtility or rebellion within the realm be aſſaulted upon their march or in their quarters as enemies, this is a levying of war; but if upon ſome ſudden falling out or injury done by the ſoldiers, the countrymen riſe upon them and drive them out, this may be a great riot, and if any be killed by the aſſailants it is felony in them; but this ſeems not a levying of war againſt the king, unleſs there be ſome traitorous deſign under the cover of it: and *clauſ. 26 E. 3. m. 24.* it appears, that an open reſiſtance of the juſtices of *oyer* and *terminer* in the county of *Surrey*, *viz. reſiſtendo juſticiariis, & ipſos juſticiarios, quo minus contenta in commiſſione noſtrâ eis inde facta exequi & facere potuerunt, impediendo*, was felony, and the offenders were executed for the ſame as felons.

Touch

I shall conclude this matter with a consultation of the judges, where I was present. All the judges except *J. Windham* and *J. Atkins* were assembled by my lord keeper *September 1675.* to consider of this case, as it was stated in writing by the attorney general in manner following.

“ A great number of the weavers in and about *London* being offended at the engine-looms, (which are instruments, that have been used above these sixty years,) because thereby one man can do as much in a day, as near twenty men without them, and by consequence can afford his ribbands at a much cheaper rate, after attempts in parliament and elsewhere to suppress them did agree among themselves to rise and go from house to house to take and destroy the engine-looms; in pursuance of which they did on the 9th, 10th and 11th of this instant *August* assemble themselves in great numbers at some places to an hundred, at others to four hundred, and at others, particularly at *Stratford-Bow* to about fifteen hundred.

“ They did in a most violent manner break open the houses of many of the king's subjects, in which such engine-looms were, or were by them suspected to be, they took away the engines and making great fires burnt the same, and not only the looms, but in many places the ribbands made thereby and several other goods of the persons, whose houses they broke open; this they did not in one place only, but in several places and counties, *viz. Middlesex, London, Essex, Kent and Surrey,* in the last of which, *viz. at Southwark* they stormed the house of one *Thomas Bybby,* and tho they were resisted and one of them kild and another wounded, yet at last they forced their way in, took away his looms and burnt them; the value of the damage they did is computed to several thousand pounds.

“ This they did after several proclamations made and command given by the justices of peace and the sheriffs of *Middlesex* to depart, but instead of obeying they re-
“ fisted

“ sifted and affronted the magistrates and officers: It is
“ true they had no warlike arms, but that was supplied by
“ their number, and they had such weapons, as such a rab-
“ ble could get, as staves, clubs, sledges, hammers, and other
“ such instruments to force open doors.

“ There was this further evil attending this insurrection,
“ that the soldiers and officers of the militia were so far
“ from doing their duty in suppressing them, that some,
“ tho in arms and drawn up in companies, stood still look-
“ ing on while their neighbours houses were broken open
“ and their goods destroyed, others encouraged them, and
“ others, to whose custody some of the offenders, who were
“ taken, were committed, suffered them to escape, so that
“ during all the time of the tumult little or nothing was
“ done to suppress them, until the lords of the council were
“ constrained at a time extraordinary to assemble, by whose
“ directions and orders as well to the civil magistrates, as
“ to the king’s guards, they were at last quieted.

Five of the judges seemed to be of opinion that this was treason within the act of 25 E. 3. upon the clause of levying war against the king, or at least upon the clause of the statute of 13 Car. 2. cap. 1.

1. In respect of the manner of their assembling, who, tho they had no weapons or ensigns of war, yet their multitudes supplied that defect, being able to do that by their multitudes, which a lesser number of armed men might scarce be able to effect by their weapons; and besides they had staves, and clubs, and some hammers or sledges to break open houses, and accordingly they acted by breaking open doors and burning the engine-looms and many of the wares made by them.

2. In respect of the design itself, which was to burn and destroy not the single engine-looms of this or that particular person, but engine-looms in general, and that not in

one county only, but in several counties, and so agreeable to *Burton's* case.

The other five judges were not satisfied, that this was treason within the clause of 25 E. 3. against levying of war, nor within the statute of 13 Car. 2. for conspiring to levy war.

1. It was agreed, that if men assemble together and consult to raise a force immediately or directly against the king's person, or to restrain or depose him, whether the number of the persons were more or less, or whether armed or unarmed, tho' this were not a treason within this clause of the statute of 25 E. 3. yet it was treason within the first clause of compassing the king's death, and an overt-act sufficient to make good such an indictment, tho' no war was actually levied; and with this accord the resolutions before cited, especially that of the insurrection in the north at *Farley* wood (*); but no such conspiracy or compassing appears in this case, and so that is not now in question, but we are only upon a point of constructive or interpretative levying of war.

2. Here is nothing in this case of any conspiring to do any thing, but what they really and fully effected; they agreed to rise in multitudes to burn the looms, and accordingly they did it, but nothing of conspiring against the safety of the king's person, or to arm themselves; therefore if what they did were not a levying of war against the king within the statute of 25 E. 3. here appears no conspiring to levy such war within the statute of 13 Car. 2. cap. 1. for, for what appears, all was done, which they conspired to do.

3. It seemed very doubtful to them, whether in the manner of this assembling it was any levying of war, or whether it were more than a riot, for in all indictments of this kind for levying of war it is laid, that they were *more guerrino*

(*). *Vide supra p. 120.*

guerrino arraiati, and upon the evidence, that they were assembled in a posture of war *armis offensivis & defensivis*, and sometimes particular circumstances also proved or found, as banners, trumpets, drums, &c. and where they were indicted for conspiring only to levy war, yet there was this circumstance accompanied it, *viz.* a confederacy to get arms and arm themselves, as in *Grant's* case, and *Burton's* case.

4. It seemed very doubtful to them, whether this design to burn engine-loomes were such a design, as would make it a levying of war against the king (*), for it was not like the designs of altering religion, laws, pulling down inclosures generally, as in *Burton's* case, nor to destroy any trade, but only a particular quarrel and grievance between men of the same trade against a particular engine, that they thought a grievance to them, which, tho it was an enormous riot, yet it would be difficult to make it treason. *Vide statutes 8 H. 6. cap. 27. 9 H. 6. cap. 5. (†).*

Many of them therefore concluded, that if Mr. Attorney should think fit to proceed as for a treason, the matter might be specially found and so left to farther advice, or rather that according to the clause of the statute of 25 E. 3. the declarative judgment of the king and both houses of parliament might be had, because it was a new case and materially differed from other cases of like nature formerly resolved.

Upon the conclusion of this debate we all departed, and Mr. Attorney upon consideration of the whole matter it seems thought fit to proceed for a riot, and caused many of them to be indicted for riots, for which they were convicted and had great fines set upon them, and were committed in execution and adjudged to stand upon the pillory.

(*) By 12 Geo. 1. cap. 34. " If any person shall wilfully break any tools used in the woollen manufacture, not having the consent of the owner, or shall break or enter by force into any house or shop by night or by day for such

" purpose, he shall be adjudged guilty of felony without benefit of clergy.

(†) Concerning the riots committed by the *Welsh* upon the dragmen of *Severn*, *vide infra p. 151.*

Touching the laws of treason in *Ireland*, by the statute of 18 *H. 6. cap. 3.* levying horse or foot upon the king's subjects against their will shall be treason; this they call cessing of soldiers upon men, and hath been often done by the lieutenants or deputies of *Ireland* by consent of the council in some cases.

Among many cumulative treasons charged upon the late earl of *Strafford* the king's deputy in *Ireland*, this one thing of cessing of soldiers upon the king's subjects in *Ireland* was the chief particular treason charged upon him.

It was insisted upon for the earl's defence, that by the statute of 10 *H. 7. in Ireland, cap. 22.* called *Poyning's law*, all the statutes of *England* are at once enacted to be observed in *Ireland*; and therefore the statute of 25 *E. 3.* declaring treasons, and the statute of 1 *H. 4. cap. 10.* enacting, that nothing shall be treason but what was within that statute, the treasons enacted in *Ireland* in the time of *H. 6.* and afterwards before 10 *H. 7.* were repealed, and consequently this statute of 18 *H. 6. cap. 3.*

But that seems not to be so, for the general introduction of the statutes of *England* being an affirmative law could not be intended to take away those particular statutes, that were made in *Ireland* for the declaring of treason, as this and that also of the same year, *cap. 2.* for taking *Comericke.* (z)

But surely this was no levying of war within this statute (a), either in respect of the matter itself or of the person that did it, he being the king's lieutenant; neither could an act by the lord deputy and council of this nature be construed to be within the penalty of this act, if it were in force; yet for this and other cumulative treasons he was attainted by act of parliament, but that attainder was very justly repealed by the statute of 14 *Car. 2.*

Now

(z) That is, for taking thieves, robbers, or rebels into safe guard.

(a) Tho' this were not levying of war, yet being cessing of soldiers upon the subject, it was treason within the

express words of that statute; nor does our author assign any reason, why an act of lord deputy and council is not within the penalty of that law. See *Camd. Eliz. p. 219.*

Now I shall draw out some observations and conclusions from the precedents and instances before given touching this obscure clause of levying war against the king.

1. A conspiracy or confederacy to levy war against the king is not a levying of war within this clause of the statute of 25 E. 3. for this clause requires a war actually levied. *Co. P. C. p. 10.*

And this appears *first* by those temporary laws, that were made to continue during the king's or queen's life, which made conspiring to levy war with an overt-act evidencing such conspiracy to be treason, as the statutes of 1 & 2 Ph. & M. *cap. 10.* 13 *Eliz. cap. 1.* and 13 *Car. 2. cap. 1.* and *secondly* by the resolution of the judges in the case of *Burton* 39 *Eliz.* cited by my lord *Coke, P. C. p. 9, 10.*

2. That yet such a conspiracy or compassing to levy war against the king directly or against his forces, and meeting and consulting for the effecting of it, whether the number of the conspirators be more or less, or disguised under any other pretense whatsoever, as of reformation of abuses, casting down inclosures particular or generally, nay of wrestling, football-playing, cock-fighting; yet if it can appear, that they consulted or resolved to raise a power immediately against the king, or the liberty or safety of his person, this congregating of people for this intent, tho no war be actually levied, is an overt-act to maintain an indictment, for compassing the king's death within the first clause of the statute of 25 E. 3. for it is a kind of natural or necessary consequence, that he, that attempts to subdue and conquer the king, cannot intend less, than the taking away his life; and indeed it hath been always the miserable consequence of such a conquest, as is witnessed by the miserable tragedies of *E. 2.* and *R. 2.* and this was the case of *Oldcastle* and *Effex.*

3. That yet conspiring to levy war, (*viz.* to do such an act, which if it were accomplished and attained its end would be an actual levying of war) and being accompanied with an overt-act evidencing it, (tho it be not treason within this clause of the act of 25 E. 3.) yet was treason during the
2
queen's

queen's life by the statute of 13 *Eliz. cap. 1.* and is treason at this day by the statute of 13 *Car. 2. cap. 1.* during the life of our now sovereign.

But then the overt-act (be it speaking, writing, or acting) required by these statutes to evidence the same must be specially laid in the indictment, and proved upon the evidence; thus in *Grant's* case and *Burton's* case the conspiring to fetch arms at the houses therein mentiond was an overt-act proving this conspiracy to levy war.

4. That a levying of war with all the circumstances imaginable to give it that denomination, as *cum vexillis explicatis, cum multitudine gentium armatarum & modo guerrino arraiat'*, yet if it be upon a mere private quarrel between private, tho great persons, or to throw down the inclosures of such a manor or park, where the party tho without title claims a common, or upon dispute concerning the propriety of liberties or franchises, this, tho it be in the manner of it a levying of war, yet it is not a levying of war against the king, tho bloodshed or burning of houses ensue in that attempt, but is a great riot, for which the offenders ought to be fined and imprisoned; and if any be killed by the rioters in the riot, it may be murder in the assailant.

This was the case of the earls of *Gloucester* and *Hereford* anno 20 *E. 1.* tho before the statute of 25 *E. 3.* and the several great riots above-mentiond, to which we may add *Rot. Parl. 50 E. 3. n. 140, 164. 11 H. 4. n. 36, 57. 13 H. 4. n. 14. 18 H. 6. n. 30.*

5. An actual levying of war therefore against the king to make a treason, for which the offender may be indicted upon this clause of the statute for levying of war against the king, consists of two principal parts or ingredients, *viz.* 1. It must be a levying of war. 2. It must be a levying of war against the king.

6. What shall be said a levying of war is partly a question of fact, for it is not every unlawful or riotous assembly of many persons to do an unlawful act, tho *de facto* they commit the act they intend, that makes a levying of war, for

then every riot would be treason, and all the acts against riotous and unlawful assemblies, as 13 *H. 4. cap. 7.* 2 *H. 5. cap. 8.* 8 *H. 6. cap. 14.* and many more (b) had been vain and needless; but it must be such an assembly as carries with it *speciem belli*, as if they ride or march *vexillis explicatis*, or if they be formed into companies, or furnished with military officers, or if they are armed with military weapons, as swords, guns, bills, halberds, pikes, and are so circumstanced, that it may be reasonably concluded they are in a posture of war, which circumstances are so various, that it is hard to define them all particularly.

Only the general expression in all the indictments of this nature, that I have seen, are *more guerrino arraiati*, and sometimes other particulars added as the fact will bear, as *cum vexillis explicatis, cum armis defensivis & offensivis, cum tympanis & tubis*: but altho it be a question of fact, whether war be levied or conspired to be levied, which depends upon evidence, yet some overt-act must be shewn in the indictment, upon which the court may judge; and this is usually *modo guerrino arraiati*, or *armati*, or conspiring to get arms to arm themselves.

And therefore in the cases of *Burton* and *Grant* before-mentioned, who were indicted and convicted upon the statute of 13 *Eliz. cap. 1.* for conspiring to levy war for pulling down inclosures, &c. there is not only a conspiracy to do the thing, but also to gain arms and weapons at the lord *Norris's* house, and elsewhere to arm themselves for that attempt.

And the reason hereof seems to be, because, when an assembly of people thus arm themselves, it is a plain evidence, that they mean to defend themselves, and make good their attempts by a military force, and to resist and subdue all power, that shall be used to suppress them; and besides the very use of weapons by such an assembly without the king's licence, unless in some lawful and special cases, carries a terror with it, and a presumption of warlike force, and therefore under a distinct and special restraint by the statute of

(b) See 3 & 4 *Edw. VI. cap. 5.* 1 *Mar. cap. 12.* 1 *Geo. I. cap. 5.*

Westminst. 2. (c), and the statute (d) of 7 E. 1. *de defensione portandi arma.*

7. Whether the bare assembling of an enormous multitude for doing of these unlawful acts without any weapons, or being *more guerrino arraiati*, especially in case of interpretative or constructive levying of war, be a sufficient overt-act to make a levying of war within this act, especially if they commit some of these acts themselves, is very considerable and seems to me doubtful, 1. Because I have not known any such case ruled. 2. Because the acts of 3 & 4 Ed. 6. cap. 5. and 1 Mar. cap. 12. (which must be intended of such unarmed assemblies) makes it in some cases felony, in some cases only misdemeanor. 3. Because it is very difficult to determine what that number must be, that must make treason, and less than which must be only a riot; this therefore should be well considered, and the direction of the statute of 25 E. 3. to expect the declaration of parliament in like cases is a safe direction, and so much the rather, because the statutes of E. 6. and queen *Mary* seem to look the other way (e), to which may be added the great riots committed by the foresters and *Welfs* upon the dragmen of *Severn*, hewing all their boats to pieces, and drowning the bargemen in a warlike posture. *Rot. Parl.* 8 H. 6. n. 30, 45. 9 H. 6. n. 37. upon which the statute of 9 H. 6. cap. 5. was made: I forbear therefore any opinion herein.

8. But whether the assembly were greater or less, or armed or not armed, yet if the design were directly against the king, as to do him bodily harm, to imprison, to restrain him, or to offer any force or violence to him, it will be treason within the first clause of compassing the king's death, and this assembling and consulting or practising together to this purpose, tho of but two or three, will be an overt-act to prove it; therefore all the question will be only touching inter-

(c) I dont find any thing to this purpose in the statute of *Westminst.* 2. So suppose the statute here meant is the statute of *Norhampton* 2 E. 3. cap. 3. whereby it is prohibited that any one bring force in affray of the people, or

go armed by night or by day. See *Co.P.C.* p. 158 & 160. *F. N. B.* p. 552.

(d) Or rather proclamation: see the beginning of this chapter.

(e) As does also 1 *Geo. I.* cap. 5.

interpretative or constructive levying of war, whereof hereafter.

9. If there be war levied as is above declared, *viz.* an assembly *more guerrino arraiati*, and so in the posture of war for any treasonable attempt; this is *bellum levatum*, tho not *bellum percussum*; and thus far touching the levying of war, as in relation to the manner of it.

10. But besides the circumstances requisite to denominate a levying of war in respect of the manner of it, there is also requisite to make a treason within this clause, that it be a levying of war *against the king*, which is the scope, end and termination thereof, for, as hath been said, there may be a levying of war between private persons upon private quarrels, which is not a levying of war against the king, and so not treason within this clause of this act.

11. A levying of war against the king therefore is of two kinds, either expressly and directly, or by way of interpretation, construction or exposition of this act: the former is, when a war is levied against the person of the king, or against his general, or army by him appointed, or to do the king any bodily harm, or to imprison him, or to restrain him of his liberty, or to get him into their power, or to enforce him to put away his ministers, or to depose him; many instances of this kind may be given, such as was in truth the riding of the earl of *Essex* into *London* armed with swords and pistols, his soliciting of the citizens to go with him to court to remove from the queen her ministers and counsellors, his fortifying of his house against the queen's officers, which were in truth a levying of war, tho his indictment was upon the first clause of compassing the queen's death, which was more clearly included within these actions.

12. Constructive or interpretative levying of war is not so much against the king's person, as against his government: if men assemble together *more guerrino* to kill one of his majesty's privy council, this hath been ruled to be levying of war against the king. *P. 16 Car. 1. Cro. 523. Bensted's case* before cited, and accordingly was the resolution of the house of lords 17 R. 2. *Talbot's case* above-mentiond.

So in the case mentiond by my lord *Coke* in the time of *H. 8. Co. P. C. p. 10.* levying war against the statute of *Labourers* and to inhanse servants wages was a levying of war against the king; and altho levying of war to demolish some particular inclosures is not a levying of war against the king; *Co. P. C. p. 9.* yet if it be to alter religion established by law, or to go from town to town generally to cast down inclosures, or to deliver generally out of prison persons lawfully imprisoned, this hath been held to be levying of war against the king within this act, and the conspiring to levy war for those purposes treason within that clause of the act of *13. Eliz. cap. 1.* as was resolved in *Burton's* case and *Grant's* case above-mentiond; and the like resolution was in the case of the apprentices that assembled *more guerrino* to pull down bawdy-houses.

It is considerable how these resolutions stand with the judgment of parliament in *3 & 4 Ed. 6. cap. 12.* which makes special provisions to make assemblies above twelve to alter the laws and statutes of the kingdom, or the religion established by law, or if above forty assemble for pulling down inclosures, burning of houses, or stacks of corn, treason; if they departed not to their homes within an hour after proclamation, or after proclamation put any of these designs in practice, which is nevertheless reduced to felony within clergy by the statute of *1 Mar. sess. 2. cap. 12.* These offenses being the same with those adjudged treason in *Burton's* case and some others before cited, why was it thought necessary for an act of parliament *3 & 4 Ed. 6.* to make it treason under certain qualifications, and why reduced to felony within clergy by the statute of *1 Mar. cap. 12.* and the statute of *3 & 4 E. 6.* repealed? It seems that altho the unlawful ends of these assemblies thus punished by *3 & 4 Ed. 6.* and *1 Mar.* were much the same with those of *Burton* and *Grant* and others, that were adjudged treason, yet the difference between the cases stood not in that, but in the manner of their assembly; those that were adjudged treasons in *Burton's* and *Grant's* case were, because it was a conspiracy to arm themselves and levy a war *more guerrino.*

But those, that were thus heightened to treason by 3 & 4 E. 6. and reduced to felony by 1 Mar. were not intended of such, as were *more guerrino arraiati*, nor a levying of war, tho their multitudes were often great, and tho they did put in ure the things they conspired to effect, and so were but great riots and not levying war within this clause of 25 E. 3. and therefore those acts inflicted a new and farther punishment on them.

III. *En son realme*: hitherto it hath been said what is a levying of war; we are now to consider the place, *En son realm*.

The realm of *England* comprehends the narrow seas, and therefore if a war be levied upon those seas, as if any of the king's subjects hostilely invade any of the king's ships, (which are so many royal castles) this is a levying of war within his realm, for the narrow seas are of the ligeance of the crown of *England*: *vide Seldeni Mare clausum*.

And this may be tried in the county next adjacent to the coast by an indictment taken by the jurors for that county before special commissioners of *oyer* and *terminer*, *de quo vide infra*, and in the chapter of piracy: *vide 5 R. 2. Trial 54*.

It is true, before the statute of 28 H. 8. cap. 15. those treasons were usually inquired and tried by special commission, wherein the admiral and his lieutenant were named, as likewise other felonies committed upon the sea.

But divers instances were in the time of E. 3. whereby such offenses upon the sea were punished as treason or felony in the king's bench. 40 Ass. 25. A *Norman* captain of a ship robs the king's subjects upon the sea, he being taken was hanged as a felon, but the *English* that assisted him were drawn and hanged as traitors; and by the statute of 28 H. 8. cap. 15. there is a direction of a special commission to try them in such counties or places as shall be assigned by such commission according to the method of trials of such offenses at the common law, but before that statute they might be tried by special commission at the common law, and according to the course of the common law; but of this *alibi in tractatu de Admiralitate*.

For treasons and other capital offences in *Scotland* there is a provision made by the statute of 4 *Jac. cap. 1.* and 7 *Jac. cap. 1.*

Ireland, tho part of the dominions of the crown of *England*, yet is no part of the realm of *England*, nor *infra quatuor maria*, as hath been ruled *temp. E. 1. Morrice Howard's case*: the like is to be said for *Scotland* even while it was under the power of the crown of *England*, as it was in some times of *E. 1.* and some part of the time of *E. 3. 8 Rich. 2. Continual claim 13.*

For *Ireland* hath the same laws for treason that *England*, tho it hath some more; yet for a levying war, or other treason in *Ireland* the offender may be tried here in *England* by the statute of 35 *H. 8. cap. 2.* for treasons done out of the realm, as was resolved in the case of *O-Rork, H. 33 Eliz. (*)* and after that in *Sir John Perrot's case (f), Co. P. C. p. 111. 7 Co. Rep. Calvin's case, 23. a.*

In the case of the lord *Macguire (g)* an *Irish* peer, who was indicted in *Middlesex* for high treason for levying war against the king in *Ireland*, he pleaded to the indictment, that he was one of the peers and lords of parliament in *Ireland*, and demanded judgment, if he should be arraigned in *England* for a treason committed in *Ireland*, whereby he should lose the benefit of trial by his peers; but it was resolved, 1. That for a treason in *Ireland* a man may be tried here in *England* by the statute of 35 *H. 8.* for it is a treason committed out of the realm. 2. That altho *Macguire*, if tried in *Ireland* for his treason, should have had his trial by his peers, as one of the lords in parliament, which he cannot have here, but must be tried by a common jury, yet that altered not the case; he was therefore put upon his trial by a *Middlesex* jury, and was convicted and had judgment, and was executed. *H. 20 Car. 1. B. R.* so that the opinion 20 *Eliz. Dy. 360. b.* was ruled no law: *vide Co. Litt. 261.*

And

(*) *Camd. Eliz. p. 458.* (f) See his trial in *State Tr. Vol. I. p. 181.* (g) *State Tr. Vol. I. p. 928.*

And the same that is said of *Ireland* may be said in all particulars of the isle of *Man*, *Fersey*, *Guernsey*, *Sark* and *Alderney*, which are parcel of the dominions of the crown of *England*, but not within the realm of *England* as to this purpose concerning treason; yet they have special laws of their own applicable to criminals and jurisdiction for their trials: as touching treason committed in *Wales* before the statute of 26 H. 8. cap. 6. no treason, murder, or felony committed in *Wales* was inquirable or triable before commissioners of *oyer and terminer*, or in the king's bench in *England*, but before justices or commissioners assigned by the king in those counties of *Wales* where the fact was committed. P. 2 H. 4. Rot. 18. Salop': "Johannes Kynaston indictatus fuit quod ipse con-
 "sentiens fuit ad falsam & proditionem insurrectionem Oweyn
 "Glyndour & aliorum Wallicorum, & sciens de toto proposito
 "eorundem, qui proditione combusserunt villas de Glyndour Dyn-
 "by, &c. & quod proditione misit Johannem filium suum bene
 "armatum & arraiatum pro guerra, & Willielmum Hunte sa-
 "gittarium ad predictum Oweyn & exercitum Wallicorum,
 " &c. dicit quod predictæ ville, in quibus supponitur proditiones
 "predictas factas fuisse, sunt infra terram Walliæ & ex-
 "tra corpus com' Salop' & legem terræ Angliæ, unde non inten-
 "dit quod dominus rex de proditionibus predictis in hoc casu
 "ipsum impetire velit, seu ipsum ponere velit inde responsurum,
 " & quia plenarie & certitudinaliter testificatum est, quod præ-
 "dictæ ville sunt infra terram Walliæ & extra corpus comitatûs
 "Salop' & legem terræ Angliæ, & Thomas Covele attornatus
 "ipsum regis coram ipso rege inde examinatus hoc non dedit, &
 "sic justiciarii ad inquirendum de proditionibus predictis infra
 "Walliam factis virtute commissionis predictæ inquirere minime
 "potuerunt, nec proditiones predictæ sic in terrâ Walliæ factæ per
 "legem terræ Angliæ triari nec terminari possunt, consideratum
 "est, quod quoad predictas proditiones predictus Johannes Kyna-
 "ston eat inde quietus, &c." But it is true by the statute
 of 26 H. 8. cap. 6. counterfeiting of coin, washing, clipping or
 minishing of the same, felonies, murders, wilful burnings of
 houses, manslaughters, robberies, burglaries, rapes, and acces-
 saries

faries of the same and other offenses feloniously done in *Wales* (*b*), or any lordship marcher may be inquired of, heard and determined before the justices of goal-delivery and of the peace and every of them in the next adjacent county: this act is confirmed by the great statute of *Wales* 34 & 35 H. 8. cap. 26. which settles the grand sessions and justices thereof, and gives the justices of the grand sessions power to hold all manner of pleas of the crown, and to hear and determine all treasons, felonies, &c. within the precinct of their commissions, as fully as the court of king's bench may do in their places within the realm of *England*; so that as to those offenses enumerated in the statute of 26 H. 8. the justices of gaol-delivery in the adjacent counties, *viz.* *Gloucester, Hereford, Salop* and *Wigorn*, had thereby a concurrent jurisdiction with the justices of the grand session (*i*).

But whether the statute of 26 H. 8. extended to treason for compassing the king's death or levying of war (*k*), or whether the same remained only triable by the justices of the grand sessions, seems doubtful, and the rather, because that statute is not construed by equity, and therefore it extends not to an appeal of murder in an adjacent county, and so it was adjudged *Hil. 7 Car. B. R. Sently* and *Price* (*l*); but at this day 26 H. 8. cap. 6. stands repealed by 1 & 2 Ph. & M. cap. 10. as to the trials of treason (*m*).

It is true, that in other criminal causes, that are not capital, as in cases of indictments of riots, they may be removed by *certiorari* into the king's bench, and when issue is joined they may be tried in the next *English* county, *T. 16 Jac.* *Sir John Carew's case* (*n*) and divers others, as well as in a *quo*

S f

minus

(*b*) For this act extends to all the ancient counties of *Wales*, as well as the lordships marchers; and so it was resolved in *Althoe's case* for a murder in *Pembroke-shire. T. 9 Geo. 1. B. R.*

(*i*) 1 *Mod.* 64, 68.

(*k*) It should seem that it did not, and that was one reason of making the statute of 32 H. 8. cap. 4. whereby all treasons or misprisions of treasons committed in *Wales* may be presented and tried in such shires and before such commissioners

as the king shall appoint, in like manner, as if the facts had been committed in such shires.

(*l*) *Cro. Car.* 247. *W. Jones* 255.

(*m*) The 1 & 2 Ph. & M. reducing all trials for treason to the order and course of the common law is a virtual repeal of 26 H. 8. and by the same reason of 32 H. 8. also as to treason.

(*n*) *Cro. Jac.* 484. 2 *Rel.* 28. 1 *Rel. Abr.* 394.

minus, which is at the king's suit: but whether a *certiorari* lies into *Wales* upon an indictment of treason or felony hath been doubted *M. 9 Car. B. R. Chedley's case* (o): it seems a *certiorari* may issue for a special purpose, as to quash the indictment for insufficiency or to plead his pardon, but not as to trial of the fact (p), but it shall be sent down by *mittimus* according to the statute of 6 H. 8. cap. 6. because it is in a manner essential for felony or treason to be tried in the proper county, unless where a statute particularly enables it, which it did in the case of 26 H. 8. only whilst it was in force, where the indictment as well as the trial is in the adjacent county.

But certainly *Wales* is within the kingdom of *England* (q), and therefore not within the statute of 35 H. 8. cap. 2. for trial of foreign treasons.

If a felony or treason be committed in *Durham*, a *certiorari* lies to remove it into the king's bench out of *Durham* directed to the justices of peace, *oyer* and *terminer*, or gaol-delivery there; for since the statute of 27 H. 8. cap. 24. they are all made by the king's commission, and so the proceedings before them are his own suit, and thus it was done in *Ruttabye's case* (r) upon debate; but if the party plead not guilty it shall be sent down thither to be tried, as was done in that case. T. 1653. They of *Durham* claim a privilege not to be sworn out of the precinct of the county palatine. *Vide* the statutes of 2 H. 5. cap. 5. 9 H. 5. cap. 7. 11 H. 7. cap. 9. for treasons and felonies in *Tindal* and *Hexamshire*.

And thus far concerning treason in levying of war against the king.

(o) *Cro. Car.* 331.(p) But yet it has been done in felony as to the trial of the fact, as in the case of *Morris*. 1 *Ven.* 93, 146. *Herbert's*case, *Latch* 12.(q) 2 *Rol.* 28.(r) *Vide infra* p. 467. and Part II, p. 212.

C H A P. XV.

Concerning treason in adhering to the king's enemies within the land or without.

THE words of the statute of 25 E. 3. go on, *viz.* *Ou soit aidant al enemies nostre dit seigneur le roy en son royalme donant a eux ayd ou comfort en son royalme ou per ailliors.*

I. Therefore we shall inquire what shall be said *enemies of the king*: those that raise war against the king may be of two kinds, subjects or foreigners, the former are not properly enemies but rebels or traitors, the latter are those, that come properly under the name of enemies.

This gives us occasion to consider somewhat of the nature of war and peace.

The power of making war or peace is *inter jura summi imperii*, and in *England* is lodged singly in the king, tho it ever succeeds best when done by parliamentary advice.

Peace is of two kinds, *viz.* 1. Positive or contracted. 2. Such a peace, as is only a negation or absence of war: that peace, which I call positive, is such as ariseth by contracts, capitulations, leagues, or truces between princes or states, that have *jura summi imperii*, and is of two kinds: 1. Temporary, which is properly a truce, which is a cessation from war already begun, and then the term being elapsed the princes or states are *ipso facto* in the former state of war, unless it be protracted by new capitulations, or be otherwise provided in the instrument or contract of the truce. 2. Perpetual, *sine termino* or indefinite, which regularly continues according to the tenor or conditions of the agreement, until some new war be raised between the princes or states upon some emergent injury supposed to be done by the one party or the other; and this is properly called a league *fœdus*, and makes the princes and states *confœderati*, and tho this may be variously diversified

verified according to the capitulations, conditions and qualifications of such leagues, yet they are ordinarily of these kinds: 1. Leagues offensive and defensive, which oblige the princes not only to mutual defense, but also to be assisting to each other in their military aggresses upon others, and makes the enemies of one in effect the common enemies of both. 2. Defensive, but not offensive, obliging each to succour and defend the other in cases of invasion or war by other princes. 3. Leagues of simple amity, whereby the one contracts not to invade, injure or offend the other, which regularly includes also liberty of mutual commerce and trade, and safeguard of merchants and traders in either's dominions, tho this may be diversified according to such contracts as are made in such leagues; and therefore in the league between king *James* of *England* and the king of *Spain* there was a tacit exception on the part of the *Spaniard* by the wary penning of the articles, whereby the freedom of our trade into the western plantations of the king of *Spain* hath been supposed by the *Spaniard* to be restrained.

2. A peace, which is only a negation or absence of war, is that which I call a negative peace, because it is only an absence or negation of war, there intervening no league nor articles of peace, nor yet any denunciation of war, for it is regularly true, *ubi bellum non est, pax est*, tho neither prince is under any capitulation or contract; for there are divers princes in the world, that never capitulated one with another, and yet there is no state of war between them; and therefore the war by the *Spaniards* upon the *Indians*, tho under pretense of religion, without any just provocation hath been held injurious and an unjust aggression, tho there intervened no former articles of peace between them.

War was antiently of two kinds, *bellum solemne vel non solemne*: a solemn war among the *Romans* had many circumstances attending it (a), and was not presently undertaken upon an injury received without these solemn circumstances.

2

1. Cla-

(a) See the manner of it described by *Dionys. Hal. Lib. II. Agel. Lib. XVI. cef. 4.* and *Liv. Lib. I. §. 32.* whereby

it appears, that the thirty-three days of dilation intervened between the demanding reparation and the indiction.

1. *Clarigatio* (*b*) or demanding reparation for the injuries received. 2. That being not done there followed indiction or denunciation of war. 3. Dilation or a space of thirty-three days before actual hostility was used; but most times necessity and politic considerations both among them and other nations did dispense with these solemnities, which were found oftentimes too cumbersome and inconvenient; especially where the delays might occasion surprisal or irreparable damage to the commonwealth, as where the adverse party made preparations, which, if not suddenly repressed; might prove more dangerous and irresistible.

But these solemn denunciations of war had place only in offensive or invasive wars, and even then had many exceptions.

1. If a war be actually between two princes or states, and a temporary truce be made as for a year or two, that term being elapsed they are in a state of war without any denunciation, for they are in the former condition, wherein they were before the truce made.

2. In case a foreign prince in peace violate that peace and becomes the aggressor, or invades the other, tho without any denunciation, the prince that is upon his defence was not bound, neither was it necessary for him to make a solemn denunciation or proclamation of war, for this solemnity of denunciation was thought only requisite on the part of the aggressor.

3. If after reparation of injuries sought instead of reparation of the former new are committed by the adverse prince, as killing of an embassador, contemptuous rejection of all reparation or mediation touching it, great provisions of hostility, or the like, there this denunciation or dilation was not requisite in the aggressor; but when all is done, supreme princes or states take themselves to be judges of public injuries, and of the manner, means and seasons for their reparations, and what they judge safest and most for their advantage is most commonly done in these cases, and they seldom want fair declarations to justify themselves therein.

T t

And

(*b*) See *Plin. Lib. XXII. cap. 2.*

And therefore whether these handsome methods be observed or not, yet if *de facto* there be a war between princes, they and their subjects are in a state of hostility, and they are in the condition of enemies (*hostes*) to each other; but now for the most part these aintient solemnities are antiquated, I come therefore to the practice of our own country and modern arms, and what we may observe from our own books, history and monuments.

We may observe in the wars we have had with forein countries, that they have been of two kinds, *viz.* special and general: special kinds of war are that, which we usually call *marque* or reprisal, and these again of two kinds, 1. Particular, granted to some particular persons upon particular occasions to right themselves, for which *vide* statute 4 *H. 5. cap. 7.* but this is not the proper place to treat touching it. 2. General *marque* or reprisal, which tho it hath the effect of a war, yet it is not a regular war, and it differs in these two instances: 1. Regularly it is not lawful for any person by aggression to take the ship or goods of the adverse party, unless he hath a commission from the king, the admiral, or those that are specially appointed thereunto. 2. It doth not make the two nations in a perfect state of hostility between them, tho they mutually take one from another, as enemies, and many times in process of time these general reprisals grow into a very formed war: and this was the condition of the war between us and the *Dutch* 22 February anno 1664. the first beginning whereof was by that act of council, which instituted only a kind of universal reprisal, and there were particular reasons of state for it; but in process of time it grew into a very war, and that without any war solemnly denounced; and therefore by the statute of 17 *Car. 2. cap. 5.* *Doleman* and others, that were in *Holland*, were declared to have traitrouly adhered to the king's enemies, and were attainted of treason, unless they rendred themselves by a day certain, and all others, that served the states of the united provinces during the continuance of the war, soldiers or seamen, by sea or land, and not returning by a time certain, were attainted of treason; and this had all the effects of war and

hostility: the goods of the *English* taken by the *Dutch* and brought *intra præfida* the property was wholly changed, and, tho retaken again, should not be restored again to the first owner, according as in captures by enemies, 7 E. 4. 14. 22 E. 3. 16. and so it was practised during that war.

A general war is of two kinds: 1. *Bellum solemniter denuntiatum*, or *bellum non solemniter denuntiatum*, the former sort of war is, when war is solemnly declared or proclaimed by our king against another prince or state; thus after the pacification between the king and the *Dutch* at *Breda*, upon new injuries done to us by the *Dutch* the king by his printed declaration 1671. declared war against them; and this is the most formal solemnity of a war, that is now in use.

A war that is *non solemniter denuntiatum* is, when two nations slip suddenly into a war without any solemnity, and this ordinarily happeneth among us, the first *Dutch* war was a real war, and yet it began barely upon general letters of *marque*: again, if a forein prince invades our coasts, or sets upon the king's navy at sea, hereupon a real, tho not a solemn war may and hath formerly arisen, and therefore to prove a nation to be in enmity to *England*, or to prove a person to be an *alien enemy* there is no necessity of showing any war proclaimed, but it may be averred, and so put upon trial by the country, whether there was a war or not; and therefore P. 31 *Eliz.* in justice Owen's reports (c), in an action of debt the defendant pleaded, that the plaintiff was an *alien* born in *Gaunt* under the obedience of the king of *Spain*; enemy of the queen, the plea was ruled good, tho he shewed not, that any war was proclaimed between the two realms; and according is the pleading 7 E. 4. 13. *Rastel's Entries, Trespass per alien.* (d)

And in very deed there was a state of war between the crowns of *England* and *Spain*, and the *Spaniards* were actual enemies, especially after the attempt of invasion in 28. by the *Spanish Armada*, and yet there was no war declared or proclaimed between the two crowns, as appears by *Camden*
sub

(c) Owen 45.

(d) *Rast. Entr.* p. 605; d. 252. b:

sub anno 31. (e). ibidem p. 404. & ibidem p. 466. (f). so that a state of war may be between two kingdoms without any proclamation or indictment thereof or other matter of record to prove it.

And therefore in the case in question touching treason it shall upon the trial be inquired by the jury, whether the person, to whom the party indicted adhered, were an enemy or not, and in order to that, whether there were a war between the king of *England* and that other prince, whereunto the party adheres, this is purely a question of fact and triable by the jury, and accordingly is the book 19 E. 4. 6. and the reason is plain, because it may fall out, that tho' there were a league between the king of *England* and a forein prince; yet the war may be begun by the forein prince: again, suppose we, that the king of *England* and the king of *France* be in league, and no breach thereof between the two kings, yet if a subject born of the king of *France* makes war upon the king of *England*, a subject of the king of *England* adhering to him is a traitor within this law, and yet the *Frenchman*, that made the war, is not a traitor but an enemy, and shall be dealt with as an enemy by martial law, if taken: this was the case of the duke of *Norfolk* adhering to the lord *Herise* a subject of the king of *Scots* in amity with queen *Elizabeth*, that made an actual invasion upon *England* without the king's commission. M. 13 & 14 Eliz. Co. P. C. p. 11. *Camd. Eliz. sub anno 1571. (g).* 14 Eliz. p. 175. and the case of *Perkin Warbeck* a *Frenchman*, 7 Co. Rep. *Calvin's case* (b). 6 Dy. 145. a. *Sherly's case* (i); so that an enemy extends farther than a king or state in enmity, namely an alien coming into *England* in hostility.

II. In the next place I shall consider what shall be said a *person adhering*, and also what shall be *adhering*.

If a forein prince be in actual war against the king of *England*, any subject of that prince under his protection is presumed to be adhering to him, but he is not a person within

(e) viz. 1588.

(f) *sub anno 1592.*(g) And also *sub anno 1572. in principio.*

(b) 7 Co. 6. b.

(i) 7 Co. *Calvin's case* 6. a.

this act, for if he be taken, he shall be dealt with as an enemy, viz. he shall be ransomed, and his goods within this realm seized to the use of the king. When king *John* was de-
velted of the duchy of *Normandy* by the king of *France*, and
thereupon the *Normans* forsook the alligeance of the king of
England, which was due to him, as duke of *Normandy*, all
the lands of the *Normans* in *England* were seized into the
king's hands, and thence grew first the escheat *de terris Nor-*
mannorum mentiond *prærogativa regis* (k) cap. 12. and the style
of such forfeiture was usually, *quia recessit à servitio nostro &*
adhesit inimicis nostris in Normannia, Claus. 6 *John m.* 19. *pro*
Eustachia uxore Lurce fil' Johannis, Claus. 8 *John m.* 5. *pro*
Abbate Cluniacensi: see the reason thereof before cap. 10. they
were *ad fidem utriusque regis*.

If there be war between the king of *England* and the king
of *France*, those *Englishmen*, that live in *France* before the
war and continue there after, are not simply upon that ac-
count adherents to the king's enemies, unless they actually
assist him in his wars, or at least refuse to return upon privy
seal, or upon proclamation and notice thereof into *England*;
and this refusal, tho it is an evidence of adherence, seems not
to be simply in itself an adherence: this appears plainly by
the statute of *Magna Carta* cap. 30.

If a subject of a forein prince hath lived here in *England*
under the protection of the king of *England*, and so conti-
nues after a war proclaimed, and partakes of all the benefits
of a subject, and yet secretly practiseth with the king of
France, and assists him before he hath left this kingdom, or
openly renounced his subjection to the crown of *England*, this
man seems to be an adherent within this act, and commits
treason thereby: *tamen quere, vide Dy.* 144. a. *Sherley's case*;
and the like law seems to be of an enemy coming hither and
staying here under the king's letters of safe conduct: *quere,*
vide statute 18 *H.* 6. cap. 4. 20 *H.* 6. cap. 1.

If there be a war between the king of *England* and *France*,
and then a temporary truce is made, and within the time of
that truce an *Englishman* goes into *France*, and stays there,

U u and

and returns before the truce expired, this is not an adherence to an enemy within this statute, *Claus. 7 E. 3. part 1. m. 9. pro Johanne Poynter*, who had an *amoveas manus cum exitibus*, his lands having been seised for that cause: but this record implies, that if during his stay (it was in *Scotland*) he had confederated or conspired with the enemy or assisted them in order to their further hostility, this might have been an adherence: *nota*, the reason, “ *Quia predictus Johannes tempore* “ *treugarum inter patrem nostrum & Robertum de Bruys ivit* “ *in Scotiam per præceptum Andree de Harcla ad pictandum* “ *quandam imaginem, quo tempore bene licuit unicuique de An-* “ *gliâ intrare in Scotiam per licentiam & literas de conductu* “ *custodis Marchiæ, & quod idem Johannes habuit tales literas* “ *Andree de Harcla, & ibidem taliter moram fecit per unum* “ *annum absque eo, quod aliquo tempore Scotis præiactis fuit ad-* “ *herens, & quod idem Johannes rediit in Angliam durantibus* “ *treugis predictis, & semper hætenus fuit ad pacem nostram* “ *& patris nostri.”* *Nota*, this *Andrew Harcla* having been created earl of *Carlisle* was by an extrajudicial military sentence first degraded, and then had judgment of high treason given against him. *H. 18 E. 2. Rot. 34 in dorso rex. (1)*

If

(1) This sentence of degradation, as well as the judgment for high treason, were pronounced at *Carlisle*, before Sir *Ralph Bassett*, Sir *John Pecche*, Sir *John de Wisban* and *Geoffrey le Scrop*, who, together with the earl of *Kent* the king's brother and *John de Hastings*, were specially constituted by letters patents, *Iusticiarii ad degradandum Andream de Harcla comitem Carlioli, inimicum & proditorem regis & regni sui, quem nuper in comitem gladio cinxerat, & ad iudicium de ipso super degradatione, inimicitia & seditione predictis pronunciandum & reddendum*; and the form of the said judgment to be pronounced was at the same time sent to the said justices in a certain schedule, *sub fede sigilli regis*, in the which judgment was accordingly pronounced in the following words: “ *Pur ceo qe nostre seignor le* “ *roi pur le graunt bien valu & loialte,* “ *qu'il entendit davour trouve en vous* “ *Andreu de Harcla pur aider & meyn-*

“ *tener ses dreytoures & les droitz de* “ *sa coroune & de soun poeple, coudre* “ *ses enemys de tous partz, & nome-* “ *ment coudre Roberet de Brus & ses* “ *autres enemys d'Escoce, vous fist counte* “ *de Cardoil, & de sa meyn vous seynt* “ *[ceynt] d'Espee, & vous dona fee de* “ *la counte, chasteux, villes, terres &* “ *tenementz, pur vostre estat meyn-* “ *ner, come counte; & apres ceo qe* “ *vous aviectz tiel honour, & bien fait* “ *resceu de nostre dit seignour, si estes* “ *alez [alicz] au dit Robert de Brus,* “ *treitroufement, fausement & mal-* “ *veisement, par escrit & par serement,* “ *pur meyntener le dit Robert d'estre* “ *roi d'Escoce, proprement en la reverse* “ *de la entencion le roi, pur quele il* “ *vous fist counte; par quei agarde ceste* “ *court, qe vous soietz degradee, & qe* “ *vous perdetz noun de counte pur vous* “ *& pur vos heires a toutz jours, & qe* “ *vous soietz deceynt del espeye & qe* “ *vos esporuns d'orrez soient coupes de* “ *talouns;*

If the king of *England* and the king of *France* be in amity, yet if a subject of the king of *England* solicits by letters the king of *France* to invade this realm, this is high treason: it was the case of cardinal *Poole*, who wrote a book to that purpose to *Charles* the emperor. *Co. P. C. p. 14.* It is certainly an overt-act to prove treason in compassing the king's death, but it seems not an overt-act to convict him of adhering to the king's enemies, for at the time of this act done the emperor was not an enemy. *Co. P. C. p. 14.*

If an *Englishman* during war between the king of *England* and *France* be taken by the *French*, and there swear fealty to the king of *France*, if it be done voluntarily, it is an adhering to the king's enemies; but if it be done for fear of his life, and that he returns, as soon as he might, to the allegiance

“ talons; & pur ceo qe vous *Andren*,
 “ homme lige nostre seignour le roi,
 “ countre vostre hoimage, foi & lige-
 “ aunce, en countre vostre seignour lige,
 “ estes aliez, tretroufement, fausement
 “ & malveusement, a *Robert de Brus*,
 “ enemy mortel a nostre seignour le roi
 “ & de soun realme & a soun poeple,
 “ par serement & par escrit, por meyn-
 “ tener au dit *Robert* & a ses heires
 “ le roialme d'*Escoce* enterement, a tut
 “ vostre force & power, countre toutes
 “ gentz, & qe vous nomeretz fis hom-
 “ mes, & le dit *Robert* autre fis, les
 “ queux dusze ordeynereint, de toutes
 “ les grosses besoignes de roialme d'*En-
 “ gleterre* & d'*Escoce*, & qe lour or-
 “ deinement se tendroit en touz poynz,
 “ & si nul, de quel estat ou condicioun
 “ qu'il fust, voust countredire le dit or-
 “ deinement en nul poynt, qe vous ove
 “ toute vostre force & power, [lui] cur-
 “ riez seur, & en taunte enpreistes,
 “ treitroufement, fausement & malveuse-
 “ ment d'entreprendre roial power, countre
 “ vostre seignour lige, les piers & le
 “ poeple du roialme, pur eux mettre en
 “ subjection, & al ordinaunce de vous,
 “ & du dit *Robert*, qi est comun enemy
 “ au roy & au roialme, & a ceste tre-
 “ soun, fausme, malveiste & treitrouse
 “ aliaunce meyntenir, feistes le poeple
 “ nostre seignour le roi jurer, en attre-
 “ aunt le dit poeple a vous, taunt come
 “ en vous feust, por meyntenir la dite
 “ tresoun, fausme, malveiste & tretrouse

“ aliaunce susdites, les queux sount no-
 “ tories & conuz en le roialme, & no-
 “ stre seignour le roi le recorde; par
 “ quei agarde ceste court, qe por la dite
 “ tresoun soietz treynez & pendutz
 “ & deceole, & qe vostre quer, bouels
 “ & entrayles, dount les treitrouses pen-
 “ sez vindrent, soient araceez, ars en
 “ poudre, & le poudre ventee, & qe
 “ vostre corps soit coupee en quatre
 “ quarters, d'ount l'un quarter sount
 “ [soit] pendu amount de la tour de *Car-
 “ doil*, un autre quarter amount de la
 “ tour de *Novel Chastel*, le terce seur le
 “ pount de *Ewerayck* & le quarter a
 “ *Salopp* & vostre tette seur le pount de
 “ *Loundres*, por ensemple qe autres n'en-
 “ preignent a faire tieux tresons a leur
 “ seigneur lige, & dictum est vicecomiti
 “ *Cumbrie* quod faciat inde execu-
 “ tionem.”

This whole proceeding was returned into chancery upon a *certiorari*, and from thence sent by *mittimus* into the king's bench there to be inrolled *ad perpetuam rei memoriam*; by this it appears, that it was not a military but designed as a judicial sentence, altho it scarce deserves that name, being throughout irregular and illegal, for that the party was not admitted to a trial, nor indeed had the commissioners power to try, their commission being (not *ad audiendum & terminandum* but) only *ad degradandum & ad iudicium reddendum & pronunciamdum*.

ance of the crown of *England*, this is not an adherence to the king's enemies within this act. *Claus. 7 E. 3. part 1. m. 15.* *John Culwin's* land being seized upon this account there was *ouster le main cum exitibus*, “ *Quia compertum est per inquisitionem, &c. quod Johannes ad fidem & pacem nostram extitit, quodque idem Johannes captus fuit de guerrâ per Scotos inimicos nostros, & in prisonâ in Scotiâ per dictos inimicos nostros, & pro vitâ suâ salvandâ ad fidem dictorum Scotorum per dimidium annum extitit, quodque idem Johannes postea in Angliam rediit, & ad fidem & pacem nostram a tempore prædicto hæctenus extitit;*” tho this was before 25 E. 3. yet the instance is useful, because adhering to the king's enemies was then treason.

If a captain or other officer, that hath the custody of any of the king's castles or garrisons, shall treacherously by combination with the king's enemies, or by bribery or for reward deliver them up, this is adherence to the king's enemies. This was the case of *William Weston* for delivering up the castle of *Oughtrewicke*, and *John de Gomeney*s for delivering up the castle of *Ardes* in *France*, both which were impeached by the commons, and had judgment of the lords in parliament, *Rot. Par. 1 R. 2. n. 40.* namely *William Weston* to be drawn and hanged, but execution was respited, *que le roy n'est uncore enforme del manner de cest judgement*: *Gomeney*s's judgment was thus, *Les seigneurs in plein parlement vous adjudgent a la mort, & pur ceo qu'estes gentlehome & banneret & aves serve le aiel le roy en ses guerres, & n'estes lige home nostre seigneur le roy, vous seres decolle sans autre justyce auer*, but execution was respited. (m)

And note, tho the charge were treason, and possibly the proofs might probably amount to it, and *Walsingham* sub anno 1 R. 2. tells us it was done by treason; yet the reason expressed in the judgment against *Weston* is only, *que surrendists le dit castle de Oughtrewicke al enemies nostre seigneur le roy avant dits sans nul dureffe ou defalt de victualls contre vous ligenance & emprise*: and the like reason is exprest in the judgment against *Gomeney*s, *Vous emprists a sauement garder sans*

les surrendy a nully &c. & ore vous Johan sans nul durefce ou defalt de victuals ou de artillery ou autres choses necessaries pur le defence de dits ville & castle de Arde sans commandment nostre seigneur le roy malement l'aucts delivers & surrendres al enemies nostre seigneur le roy per vostre defalt demesne contre tout plain de droit & reason, & encountre vostre emprises suisdits, &c.

The truth is, if it were delivered up by bribery or treachery, it might be treason, but if delivered up upon cowardice or imprudence without any treachery, tho it were an offense against the laws of war, and the party subject to a sentence of death by martial law, as it once happend in a case of the like nature in the late times of trouble (*n*), yet it is not treason by the common law, unless it was done by treachery; but tho this sentence was given *in terrorem*, yet it was not executed: it seems to be a kind of military sentence, tho given in parliament, like unto that of the baron of *Graystock* governor of *Berwick* (*o*), who travelled into *France* without the king's commandment, and left the care of the garrison to *Robert de Ogle* a valiant knight, who used all imaginable courage in defense thereof, but it was lost in the absence of the baron of *Graystock*, who was thereupon sentenced to death, because he had undertaken that charge, and yet went from it without the king's command, and in his absence it was lost: this also seems rather a sentence of council of war, than a judgment of high treason; and thus far touching the treason of adhering to the king's enemies within the land and without.

Touching the trial of forein treason, *viz.* adhering to the king's enemies, as also for compassing the king's death without the kingdom at this day, the statute of 35 *H. 8. cap. 2.* hath sufficiently provided for it. (*p*) *P. 13 Eliz. Dyer 298, 300.*

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Story's

(*n*) This was the case of Col. *Ficnes*, parliament governor of *Bristol* for cowardly surrendring the same to the king's forces. See *State Tr. Vol. 1. p. 745.*

(*o*) See this case *State Tr. Vol. 1. p. 797.*

(*p*) This statute gives power to try such treasons in the king's bench or by commissioners in any county appointed by the commission, and continues in

force notwithstanding 1 & 2 *Ph. & Mar. cap. 10.* which reduces the methods of trial for treason to the course of the common law, because it is not introductive of a new law, but only settles a point, that was before doubtful at common law; and it was accordingly so resolved in *Storie's* case, *Dyer 298. b. Co. P. C. p. 24.*

Story's case; but at common law he might have been indicted in any county of *England*, and especially where the offender's lands lie, if he have any. 5 R. 2. *Trial* 54.

And it seems, if the adhering to the king's enemies were upon the narrow seas, this is an adherence to the king's enemies within the realm, and tho it be triable by a special commission at this day grounded upon the statute of 28 H. 2. yet at common law it might have been indicted and tried in any adjacent county by a special commission of *oyer and terminer*, for the narrow seas are within the king's alligeance, and part of the realm of *England*. 6 R. 3. *Protection* 46. *Co. Lit.* 260.

C H A P. XVI.

Concerning treason in counterfeiting the great seal or privy seal.

FIRST, I shall upon this article consider how the common law stood before this statute, and what kind of offense this was antiently, and how punished. *Secondly*, I shall consider how the law hath been taken touching this offense since the statute, and how punished.

I. The *great seal* of *England* is the great instrument, whereby the king dispenseth the great acts of his government and the administration of justice; under this seal the great commissions to his justices and others are passed; original writs and mandates, and those processes, that issue out of chancery, all the king's grants and charters of lands, liberties, franchises, honours, pardons are passed under this seal.

There is or should be always a *memorandum* made upon the close rolls of the breaking of the old seal and making and delivering of the new; and by the very delivery of this seal the office of keeper of the great seal is constituted, and most ordinarily is to the same person, that is lord chancellor: sometimes the custody of the great seal is in one person, and the office of lord chancellor in another; but always a *memorandum* of the delivery thereof entered upon the close rolls. The great seal consists ordinarily of two impressions, the one the very great seal itself with the king's effigies instamped on it, the other is commonly called *pes sigilli*, and sometimes in our old books called *le targe*, which is the impression of the king's arms in the figure of a target, which is used in matters of smaller moment as certificates, which are usually pleaded *sub pede sigilli*.

Antiently, when the king travelled into *Normandy, France* or other forein kingdoms upon occasion of war or the like, there were two great seals, one went along with the king, the other was left with the *custos regni*, or sometimes with the chancellor, if he went not along with the king, for the dispatch of the affairs of the kingdom, and then the king upon his return sometimes redelivered the old seal and took in the new, *Claus. 20 E. 3. part 2. m. 26. dorſ. Claus. 19 E. 3. part 2. m. 23 & 10. dorſ. Claus. 20 E. 3. part 2. m. 18. dorſ. & frequentissime alibi in dorſo clausorum.*

The *privy seal* is ordinarily a warrant for the passing of things under the great seal, sometimes a warrant to issue treasure, to make allowances, &c. *vide 11 Co. Rep. 92.* the earl of *Devonshire's* case; and this seal is ordinarily in the custody of the lord keeper of the privy seal or commissioners thereunto appointed.

Besides these seals of greater moment there are other seals of the king, as the *privy signet*, the particular seals of the several courts, that of the *king's bench* and *common pleas* in custody of the chief justices of either court, or their clerks appointed for that purpose, the seal of the *exchequer* in the custody of the chancellor of the exchequer, the seal of the duchy of *Lancaster* in the custody of the chancellor of the duchy

chy, the seal of the county palatine of *Lancaster* in the custody of the chancellor of the county palatine, which are sometimes in the same person, the seals of county palatine of *Chester*, of the several justices of assize, *oyer* and *terminer* and gaol-delivery, the king's seal of statutes and recognizances, the seal of the cocket; and for the most part these seals are delivered by the king's order signified sometimes by his privy signet, sometimes by his secretaries, but antiently the most of them were delivered by the king in person to the several persons, that had the custody thereof, and a *memorandum* made thereof upon the back of the close roll. *Claus. 43 E. 3. m. 18. dorf.*

The antient manner of delivery of the seal for statutes merchant, and probably for other seals of like nature was by the king in person as before, or by a close writ and *memorandum* under the great seal. *T. 19 E. 1.* it is commanded, that for the future it should be delivered under the seal of the chancellor of the *exchequer*.

The manner antiently of delivering the judicial seals of the king's bench and common pleas was by the king or chancellor to the chief justices respectively, and in like manner the judicial seal of the *exchequer* to the chancellor of the *exchequer*; these were ordinarily in two pieces, *Claus. 43 E. 3. m. 18. dorf.* The profits of the seals belonged to the king, except the seventh penny, which is the fee of either chief justice (*a*); and when the king farmed out the profits of the seal

(*a*) The antient fee to the chief justice was one penny for every writ, as appears from two of the records here quoted by our author, *viz. 20 E. 3. Rot. 87. 22 E. 3. Rot. 115.* the first of these is a grant to *Walter* of *Yarmouth* of the profits of the seals for ten years, in consideration that the said *Walter* should pay to the clerk of the hanaper for the king's use 250 mares every year, and should likewise discharge a debt of the king's of 2000*l.* by the yearly payment of 200*l.* the said *Walter* to be allowed every year *cents solds* for his expenses in sealing writs; all

writs *ad sectam regis, &c.* to pay no fees, *Et que les justices preignent vn denier du brief por leur sealx en manere come ad este use en temps passe.*

The latter is a grant of the king (upon his having resumed the seals on account of some misdemeanor committed by *Walter* of *Yarmouth*) to *John de Padbury* and *Henry de Sulibull*, *reddendo inde regi de claro per annum ducentas & quater viginti marcas per manus clerici hanaperii, writs ad sectam regis, &c.* to pay no fees, & *quod justitiani nostri in placeis illis percipiant unum denarium de*

seal of either court, sometimes one piece remaind with the chief justice or his deputy, the other piece remaind with the farmer or his deputy: these profits of the seals of the courts of the king's bench and common pleas were let for 1000 *l.* per annum (b) by the king. M. 18 E. 3. Rot. 35. Rex. P. 20 E. 3. Rot. 87. T. 22 E. 3. Rot. 115. M. 23 E. 3. Rot. 31. coram rege. (c)

Many times the justices issued process under their own seals unto the sheriffs: this was complained of *inter petitiones*

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de brevi pro sigillis suis, prout ibidem hactenus est usitatum: it should seem therefore, as if the person employed by our author to consult the record mistook the word *vi* in the first grant for a numeral *vii*, and that this was the occasion of his making the seventh penny to be the fee of the chief justice.

(b) These profits were not let for above three or four hundred pounds per annum, as appears not only from the above-mentioned cases, (the highest of which is 200 *l.* and 250 marks per annum, which is no more than 366 *l.* 13 *s.* 4 *d.*) but also from the 18 E. 3. Rot. 35. where the king signifies by writ 20 Octob. to his justices, that he had granted to Matthew Canaccon and his assigns *totum proficuum ad se de sigillis omnium brevium judicialium de banco suo & banco communi exeuntium pertinens, usque ad terminum decem annorum, in valorem trescentarum librarum per annum, de quibus ipsi solvent ad opus regis custodi hanaperii cancellarie quolibet dictorum decem annorum centium libras de exitibus brevium predictorum, & reservabunt penes se totum proficuum residuum de brevibus supradictis durante dicto termino in recompensationem decem [duo] millium librarum sterlingorum, de quibus predictus Mattheus in debitis, in quibus rex certis personis in ducatu Aquitanie tenebatur, assumpsit regem acquietare & exonerare; ita semper quod brevia ad sectam & pro commodo regis pervisum & testimonium illorum, qui pro rege prosequuntur, ac brevia pro hominibus de curiis regis, & pauperibus hominibus facta & facienda absque aliquo inde solvendo deliberentur, prout hactenus in cancellaria fieri consuevit. Et sciendum quod eodem 20 die Octob. Robertus de Sadynghon Cancellar' domini regis liberavit Willielmo Scot [capituli*

justitiario] apud Westm' quoddam sigillum domini regis pro brevibus predictis in banco domini regis sigillandis, cujus unam partem idem Willielmus Scot liberavit cuidam Rogero de Merlawe, deputato dicti Matthei Canaccon jurato, aliam vero partem ejusdem sigilli penes se ipsum retinendo; Et dictum est eidem Rogero, quod officio predicto bene & fideliter intendat secundum formam & conditionem in brevi predicto contentas periculo quod incumbit, &c.

Altho the consideration is here said to be the discharging a debt of ten thousand pounds, (which probably led our author to think the profits were let at 1000 *l.* per annum, so that in ten years time that debt might be discharged) yet the annual produce of the seals being no more than 300 *l.* one hundred whereof was to be paid yearly for the king's use, it seems to me pretty plain, that the king's debt, which he undertook to pay, could be only two and not ten thousand pounds; what strengthens this observation is, that the indentures of agreement being in French, it was very easy to mistake *deux* for *diez*.

(c) This was a grant of the seals of the king's bench and common pleas to Anthony Backe for seven years in recompensationem septingentarum marcarum (due to him on an annuity formerly granted) at the rate of 200 *l.* per Annum for the two first years of the said term, and 200 marks per annum for the five remaining years, the said Anthony to pay to the clerk of the hanaper for the king's use one [two] hundred marks per annum for the two first years, and one hundred marks per annum for the five remaining years; and the king thereupon sends his writ de admittendo predictum Antonium vel ejus attorn' ad officium predictum modo debito faciendum; and he was admitted accordingly.

parliamenti 12 E. 3. n. 6. by the chancellor of the *exchequer* and clerk of the hanaper, as a derogation to the king's profit, and contrary to the duty of the sheriff, who by his oath is bound to receive no writs, but under the king's seal: the answer is, *Soit briefe mand' a justic' de common banc contenant l'effect de petition, & quilz pur leur advisement facent tiel remedy en leur place, come ils verront, qe soit a faire a profit du roy.*

And it seems most usual, that since that time judicial procefs not only in those greater courts, but in most other courts issued under the king's seals thereunto deputed, yet justices of assise and gaol-delivery sometimes make their precepts under their own seals: *vide Judicial Register* 34, 35, 41, 43, 73, 84. *vide pur ceo Rot. Parl.* 25 E. 3. n. 25. a petition that judicial procefs out of the king's bench and common pleas might issue under the seal of the chief justices, as is used in *eyre, assises, & oyer & terminer*, but denied.

But to return to the business of the great and privy seal.

The great seal which *Matthew Paris* (*d*) *sub anno* 1250. well calls (*clavis regni*) hath been with great care and solemnity kept and used, and therefore antiently, when there was any change made of the great seal, there was not only a *memorandum* made thereof *in dorso clausorum cancellariæ*, and a public notification thereof in the court of chancery, but public proclamation was made thereof. *Claus.* 1 E. 3. *part* 2. *m.* 11. *dorso.*

Yet in cases of speed and necessity, and sometimes for distinction's sake the king used a private seal for such occasions, which were to be passed under the great seal.

King *John* died his son king *Henry III.* being but about ten years old, from the beginning of his reign until 3 H. 3. all grants passed under the seal of the earl marshal, that was his protector or guardian, but in the king's name, *viz. In cujus rei testimonium has literas nostras sigillo comitis mariscalli rectoris nostri & regni nostri sigillatas, quia nondum sigillum habuimus, vobis mittimus, teste Willielmo comite mariscallo.* This seal he continued till the third year of his reign, *Claus.* 3 H. 3.

m. 14. *hic incepit sigillum regis currere*: and in the same third year, *viz.* *Pat.* 3 *H.* 3. *m.* 6. there was a provision made in parliament for the discrimination of those charters, that passed during his minority and after his full age, in these words: “*Henricus Dei gratiâ, &c.* Sciatis quòd provisum est per commune consilium regni nostri, quòd nullæ cartæ, nullæ literæ patentes de confirmatione, alienatione, venditione vel donatione, seu de aliqua re, quæ cedere possit in perpetuitatem, sigillentur magno sigillo nostro usque ad ætatem nostram completam, *Teste, &c.*” and after the setting down of divers witnesses are these words, “Provisum est etiam per commune consilium regni nostri & coram omnibus prædictis, quòd si aliquæ cartæ vel aliquæ literæ patentes factæ secundum aliquam prædictarum formarum sigillatæ inveniuntur prædicto sigillo, irritæ habeantur & inanes, testibus prædictis.”

It appears *Clauf.* 20 *E.* 2. *m.* 3. *dors.* in the beginning of that miserable tragedy, that the 26th of *October* 20 *E.* 3. the king flying from his wife and son, who was afterwards king, a great number of lords and others chose *Edward* the king’s eldest son to be *custos regni*, supposing the king to be out of the kingdom; at that time the chancellor together with the great seal were with the king, and the new *custos regni ea, que juris fuerant, sub sigillo suo privato in custodia domini Roberti de Wyvill clerici sui existent’, eo quòd aliud sigillum pro dicto regimine ad tunc non habuit, exercere incepit, postmodum vero 20 die Novemb. proxime sequent’, captis inimicis prædictis & dicto rege in regnum revertente,* upon a message sent to the king for the seal the king thereupon sent the great seal to his wife and son, *ut non solum ea, que pro jure & pace essent facienda, sed etiam que gratiæ forent, fieri facerent*; the seal was brought to them 26 *Novemb.* and the morrow being the feast of *St. Andrew* it was opened by the queen and her son, and delivered to the bishop of *Norwich*: and it is to be observed, that a parliament was summoned between the 26th of *October* and the 26th of *November* in the name of the king, but to be held before the queen and the *custos regni in quindena sancti Andree*, which summons must needs be under his

own private seal; but the 3^d of *December* the great seal being then in their power it was prorogued unto the morrow of *Epiphany*: the first summons is recited in the writ of *prorogation*, but it is not entred of *record*, for it was a hasty confused business, neither had they the rolls of the chancery in their hands to make any entry of it; and if they had had them, yet it would have been irregular, and not have amended the matter: all that I shall farther add concerning these two instances is, that neither the seal of *William* earl *Marshal* used by *Henry III.* nor the private seal of prince *Edward* were great seals within this statute, whereof the counterfeiting might be high treason.

When the king dies, tho the office of keeper of the great seal expires, as well as all commissions to sheriffs and justices, yet the great seal of the last king continues the great seal of *England*, till another be made and delivered.

King *Edward III.* began his reign the 25th of *January*, he made the bishop of *Ely* his chancellor the 28th of *January*, it was not possible a new seal could be made in that time, and besides the seal was not altered till the 3^d of *October eodem anno*, as appears by the proclamation thereof, *Claus. 1 E. 3. part 2. m. 11. dorf.* so that all that while the old seal with the old inscription stood; the method of which alteration was thus: The king by his proclamation bearing *teste 3 Octob. anno 1.* directed to all the chief sheriffs of *England*, signifying, that he had made a new great seal, and that it was to take place from the fourth day of that month of *October*, sends them the impression of the new seal in wax, commands them to publish it, and that after the fourth day of *October* they should give faith to it, and receive no writs but under the new seal after that day.

The fourth of *October* being *Sunday* the bishop of *Ely* chancellor produceth the new seal, declares the king's pleasure, that it should be from thenceforth used; the *monday* after the old seal is broken *præcipiente rege*, and the pieces delivered to the Spigurnel. (e)

I

Again,

(e) The *Spigurnel* was an officer, whose place was to seal the king's writs. *Cambd. Remains, p. 126.*

Again, king *Henry V.* died 30 *Augusti anno sui septimo*, a parliament was summoned by writ bearing *teste 29 Septemb. anno primo H. 6.* to be held *die lunæ antè festum Martini*, a commission issued to the duke of *Gloucester* bearing *teste 6 Novemb. 1 H. 6. ad inchoandum parliamentum, &c.* and the bishop of *Durham* chancellor to *Henry V.* delivered up the seal to the king 28 *Septemb.* The new seal with the new inscription was in that parliament ordered to be made, the bishop of *Durham* was made chancellor by commission under the great seal dated 16 *Novemb.* the new seal was not made till some time after, therefore the old seal of *Henry V.* was used in the summons of the parliament and all the transactions till the new seal was delivered: indeed when *Edward IV.* assumed the crown, the seal of *Henry VI.* was not used, for it could not be had, and if it could, yet *Henry VI.* being declared an usurper, there was no reason for *Edward IV.* to give any countenance to that usurpation by using of his seal, who was declared an usurper and attainted of treason.

So that (except the last case of an usurper) till a new great seal be made, the old seal, being delivered to the keeper and used and employed as the great seal, is the great seal of *England* within this statute, notwithstanding the variance in the inscription, *portraiture*, and other substantials from the state of the present governor.

But then, what shall we say of the old seal, when the new seal is made and delivered of record to the keeper, and the old seal broken? To this I say, 1. It was once the great seal of *England*, and therefore the counterfeiting of that seal and applying it to an instrument of that date, wherein the old seal stood, or to an instrument without date, is high treason; nay, if in the time of *Edward IV.* a man should counterfeit the great seal of *Henry VI.* and apply it to a patent or other instrument of his time, it had been high treason, tho *Henry VI.* were an usurper, and his seal in the time of *Edward IV.* of no value. 9 E. 4. (f)

Z z

But

(f) This is *Bagot's* case, 9 E. 4. 1. b. " of E. 4. for treason done against H. 6. where it is said by the counsel, " That " in compassing his death, &c. " a man shall be arraigned in the time

But what if in the case before intanced in after the 4th of *October* 1 *E. 3.* a man had forged a grant by king *Edward* III. (*g*), bearing *teste* 2 *E. 3.* when the old seal was out of date, or in the time of *Edward* IV. had forged a grant by *Edward* IV. and counterfeited the seal of *Henry* VI. thereunto; this seems not to be a counterfeiting of the great seal of *England*, if the difference appear very legible and conspicuous, for at the time, whereunto it relates, there was no such great seal in being; but if the difference between the seals be such as be not evident to the view of every man's eye, it may be more doubtful; *sed vide de hoc infra.*

This statute speaks only of the great seal, and privy seal, and therefore no other seals were within this statute.

But by the statute of 1 *Mar. sess. 2. cap. 6.* "If any do falsly forge or counterfeit the queen's sign manual, privy signet or privy seal, every such offense shall be high treason, and the offenders herein, their counsellors, procurers, aiders and abettors being convicted according to the course of law shall be adjudged traitors against the queen, her heirs and successors." But now what shall be said concerning these other seals above-mentiond, as the seals for the writs of the courts of king's bench, common pleas, and exchequer, the seal for statute-merchant, &c.

By the old law, it seems that counterfeiting any of the king's seals, wherewith writs were sealed, was petit treason, tho it came under the name of *crimen falsi.* *Glanvil*, that wrote in *Henry* II.'s time, *Lib. XIV. cap. 7.* "Distingendum est, utrum fuit carta regia an privata, quia si carta regia, tunc is, qui super hoc vincatur (scilicet de falsificatione) condemnandus est tanquam de crimine læsæ majestatis; si vero fuerit carta privata, tunc cum convicto mitius agendum est, sicut in cæteris minoribus criminibus falsi, in quorum judiciis consistit eorum condemnatio in membrorum solummodo amissione, pro regia tamen voluntate." *Bracton*, that wrote in the time of *Henry* III. *Lib. III. cap. 3. de crimine læsæ majestatis, §. 2.* "Est & aliud
2 "genus

(g) This must be understood under the old seal.

“ genus criminis læsæ majestatis, quod inter graviora nu-
 “ meratur, quia ultimum inducit supplicium & mortis occa-
 “ sionem, scilicet crimen falsi in quâdam sui specie, & quod
 “ tangit coronam ipsius regis, ut si aliquis accusatus fuerit
 “ vel convictus, quòd sigillum domini regis falsaverit configa-
 “ nando inde cartas vel breviam, vel si cartas confecerit & bre-
 “ viam & signa apposuerit adulterina, quo casu si quis inde
 “ inveniatur culpabilis vel feisitus, si warrantum non habue-
 “ rit, pro voluntate regis judicium sustinebit, &, si warrantum
 “ habuerit & warrantizaverit, liberabitur & tenebitur warran-
 “ tus:” *Fleta*, that wrote in the time of *E. 1. Lib. I. cap. 22.*
de crimine falsi, tells us, “ Crimen falsi dicitur, cum quis accusa-
 “ tus fuerit, quòd sigillum regis, vel appellatus, quòd sigillum
 “ domini sui, de cujus familiâ fuerit, falsaverit & breviam inde
 “ consignaverit, vel cartam aliquam vel literam ad exhareda-
 “ tionem domini vel alterius damnum sic sigillaverit, in quibus
 “ casibus si quis inde convictus fuerit, detractari meruit & suspen-
 “ di. §. 3. Item crimen falsi dicitur, cum quis illicitus, cui non
 “ fuerit ad hoc data autoritas, de sigillo regis rapto vel in-
 “ vento breviam cartasve consignaverit:” *Briton*, that wrote in
 the time also of *E. 1. cap. 4.* “ Soit inquire de tous ceux, qui
 “ ascun fausin averont fait a nostre seale, come de ceux qui
 “ per engin ont nostre seale pendu a ascun charter fauns con-
 “ ge, ou que nostre seale ount emble ou robbe, ou autre-
 “ ment troue eient ensele brefs fauns autre auctorite, and
 “ *cap. 8.* Graund treson est a fauser nostre seal, &c.”

Upon these old books there is no difference made touching the king's seals, but generally the crime of treason was supposed in counterfeiting any of them, but most certainly the statute of 25 *E. 3.* extends only to the great and privy seal, as to the point of treason; but then whether that, which was a treason before, remain not still a felony at the common law (for all treasons include felony. 3 *H. 7.* 10. *Co. P. C.* p. 15.) is considerable.

M. 2 H. 4. B. R. Rot. 2. as I take it, *Visum est curiæ, quòd contrafactio sigilli regis pro recognitionibus est nisi feloniam (h):* but
 tho

(h) There is no such entry to be found the plea or crown-roll of that term, but either on the second or seventh roll of the words cited by our author are in the abstract

tho they held it not treason, they do not positively affirm it felony since the statute of 25 E. 3. but only *non est nisi feloniam, viz.* that at most it can be only felony.

P. 6 E. 2. B. R. Rot. 2. Essex. Johannes de Bosco per cur' est culpabilis pro falsitate, eo quod cepit cultellum suum & calefaciebat eum apud ignem & aperuit breve regis & imposuit aliud fictum, dicit quod est clericus, & traditur ordinario Westm' (i).
Simile P. 18 E. 2. B. R. Rot. 25 Rex. (k)

2

It

abstract of the rolls of the king's bench of Mich. 2 H. 4. Rot. 7. but upon what authority is uncertain, being in a different and more modern hand than that of Mr. Agard, who in the reign of James I. abbreviated the king's bench rolls.

(i) The record of this case is thus, "John de Bosco was arraigned pro falsitate sigilli & brevis domini regis, eo quod ivit cum brevi [de cancellaria] ad ignem & calefaciebat cultellum, & cum illo cultello ceram dicti brevis findebat, & amoto illo brevi imposuit aliud breve [this was a Superfedecus to the sheriff of Essex] & illud in eadem cera includit & tradidit fervienti suo illud breve vicecomiti Essex deferendum, qui quidem serviens in presentia predicti Johannis de Bosco liberavit eidem vicecomiti falsum breve predictum: Dicit quod clericus est:" upon which he was claimed by the abbot of Westminster his ordinary; "Sed ut sciatur pro quali eidem ordinario liberari debeat," a jury *ex officio* pass upon him, who find him guilty "de predicta falsitate, findendo cum cultello suo predicto ceram predictam & imponendo falsum breve predictum, sicut ei superius imponitur: Ideo inde ad iudicium, &c. & interim committitur marisch', &c." there is no judgment entered upon the roll; so that from this record, which is not in usual form, it is doubtful whether he had his clergy or not, tho from a jury passing upon him *ex officio* it is most probable he had, but yet it should seem from the case of Geoffrey de Huntinton & Richard de Clynton, which was but six years afterwards, as if this offense was not so much as felony; they were charged "pro contrafectione sigilli regis & cartæ sub sigillo regis sic contrafacto," which was

found in their custody; afterwards they plead the king's pardon "pro omnibus felonis & transgressionibus, & quia inspecta carta predicta, quæ dicitur esse contrafacta, compertum est, quod carta non est de forma in cancellaria regis usitata, inspecta etiam cera eisdem cartæ suspectæ compertum est, quod cera illa impressa est sigillo regis cancellar', sed prius apposita fuit cuidam alteri literæ regis patenti, quod citius dici potest transgressio, quam contrafactio. Et dominus rex perdonavit eis sectam pacis suæ, quæ ad ipsum pertinet, de omnimodis felonis & transgressionibus, &c.——— jam per tres annos in prisona regis steterint occasione predicta & non alia causa, dictum est———quod deliberet eos, &c. & ipsi eant inde quieti, &c. Et carta illa cancellatur in cur." Mich. 11 E. 2. B. R. Rot. 156. Herefrom hence it appears that the judgment afterwards in Leake's case 4 Jac. 1. was agreeable to the antient resolutions.

(k) This is the case of Philip Burden, but is by no means similar to that of John de Bosco, for this was a direct actual counterfeiting of the great seal: *vide infra in notis.* See also another case to this purpose for counterfeiting the privy seal. Rot. part. 6 E. 2. part 2. m. 18. "John de Redynges was arraigned and tried coram senescallo & marscallo hospicii domini regis pro contrafectione privati sigilli domini regis, & pro quibusdam litteris de predicto sigillo contrafactis [contrafacto] consignatis cum eo inventis," and being found guilty had judgment, "Quod pro predicta seditione [seditione] sit detractus, & pro manu opere cum sigillo predicto postea suspensus." *vide Ryley's Placita Parliamentaria, p. 542....545.*

It appears not, whether it were a writ under the great seal or a judicial writ of some court, but whether it were the one or the other, it seems to be capital, for he had the benefit of clergy, which in those times was allowable in some cases of treason; so that it seems a counterfeiting of any of the king's seals was felony at common law, but whether it so continues, notwithstanding the statute of 25 E. 3. hath degraded it from treason, unless it be the great or privy seal, shall be farther examined.

II. Having thus considered the seals, it remains to consider what shall be said *a counterfeiting* of the great or privy seal.

A conspiracy or compassing to counterfeit the great or privy seal is not a counterfeiting nor treason within this act, for it must be an actual counterfeiting. *Co. P. C. p. 15.*

A taking the great seal off from a true patent and clapping it on a forged patent in former times hath been held high treason; in 40 *Aff. 33.* it is plainly held to be high treason, (tho my lord *Coke* (l) saith otherwise) for the woman, that did it, could not be let to mainprise, which if it had been only a great misprision, she had beenailable upon that indictment. (m)

2 *H. 4. 25.* which is entred *H. 2. H. 4. B. R. Rot. 16. Midd. Clement Petifon's* case, the taking off the true seal from one patent and fixing it to a forged patent is adjudged high treason; yet the judgment is only *quod distrabatur & suspendatur*, which is the judgment in petit treason.

This case and the reporting of it is disliked by my lord *Coke, P. C. p. 15. (n)*; but *Stamf. Pl. C. p. 3.* seems to agree with this resolution.

A a a

But

(l) *Co. P. C. p. 15.*

(m) This argument of our author is very far from being conclusive, for by the statute of *Westm. 1. cap. 15.* where the offense is *open and manifest*, (which for what appears was the case here) the offender is notailable, altho it were only a misprision. 2 *Co. Inst. 188, 189.*

(n) And well it might be, for that case appears by the record to have been thus: "*Clement Peytrey*n was indicted,

" quod contrafecit magnum sigillum do-
 " mini regis falso & malitiose & prodi-
 " torie, & cum dicto sigillo sic contra-
 " facto quasdam literas, quæ præsent'
 " prædict' sunt consur', sigill': he pleads
 " not guilty, the jury find, quod quoad
 " contrafactionem sigilli prædicti idem
 " *Clemens* in nullo est culpabilis, sed
 " dicunt, quod idem *Clemens* falso &
 " deceptorie & in deceptionem populi de
 " assensu aliorum de covina sua scribi fe-
 " cit,

But the later authorities are against it, and that it is only a great misprision and offense, but not high treason, no nor yet felony, as it seems by the book hereafter cited.

37 H. 8. B. *Treason* 3. A chaplain taking a good seal off from an old patent, and fixing it to a forged dispensation of non-residence no treason, but only a great misprision punishable by fine and imprisonment.

H. 4 Jac. cited by lord Coke, P. C. p. 16. *Leake's case*, who joined two parchments together with glew so close, that it could not be discerned, and put a label through both, and on the one a true patent granted, which passed the seal, and then afterwards upon the other parchment wrote a forged patent, then he cut off the true patent and published the other as a true patent; this was ruled by the advice of all the judges, 1. That this was no counterfeiting of the great seal, nor treason within this act. 2. But if it had been a counterfeiting of the seal, he might have been generally indicted of treason for counterfeiting the great seal, but it was ruled to be a great misprision or offense, but not high treason; and with this opinion agrees my lord Coke, and it is the safer and latter opinion and fit to be followed.

If the patentee of the king of lands under the great seal raze the name of one of the manors and make it another name, this is not counterfeiting of the seal nor treason within this

2

“ cit, & finxit literas prædictas, & super
 “ literas illas pendi fecit sigillum mag-
 “ num domini regis, quod antea pende-
 “ bat super aliam magnam patentem do-
 “ mini regis, & sigillum domini regis
 “ prædictum subtiliter & privatè consui
 “ fecit super literas falsas prædictas, &
 “ illas falsas literas una cum sigillo do-
 “ mini regis prædicto in diversis parti-
 “ bus regni *Angliæ* tanquam veras lite-
 “ ras patentes, prout eadem literæ faci-
 “ unt mentionem, usus est & exercebat
 “ in deceptionem domini regis & populi
 “ sui; propter quod pro eo, quòd cur-
 “ ria non avisatur, quale iudicium præ-
 “ dictus *Clemens* in hac parte subire
 “ debeat, remittitur prisonæ maresch’:
 “ Afterwards in the *Easter* term next
 “ following, viso indictamento necnon
 “ veredicto prædictis videtur curiæ hic,
 “ quòd falsæ literæ prædictæ sic in decep-

“ tionem domini regis & populi sui
 “ factæ & sigillatæ, una cum usu & ex-
 “ ercizio earundem, *alta proditione* sunt,
 “ consideratum est, quòd prædictus *Cle-*
 “ *mens Peytenyn* distrahatur & suspen-
 “ datur.” This must be owned to be a
 very extraordinary case, for as lord Coke
 justly observes, whatever offense this
 were, yet this judgment ought not to
 have been given upon this verdict, for
 the jury had expressly acquitted him of
 the offense charged in the indictment;
 not to mention, that it is directly contrary
 to the case above-mentioned of *Geoffrey*
de Huntinton; there is likewise another
 irregularity in this case, that tho the of-
 fense was committed after the 25 E. 3.
 and is laid to be done *proditione*, yet it
 is not laid to be *contra formam statuti*,
 as since that statute all treasons ought
 to be.

this statute, but a great offense or misprision, for which the abbot of *Bruer* was sentenced before the king and his council, and the abbot delivered up the charter to be cancelled. *Claus.* 42 E. 3. m. 8. *dors.* Co. P. C. p. 16.

If the chancellor or keeper affix the great seal to a charter without warrant, tho this be a misdemeanor in him, it is not treason within this statute, tho *Briton* and *Fleta ubi supra* make it treason at common law; and altho it should be supposed treason at common law, but not comprised within the statute, yet it is not now felony; therefore the rule taken 3 H. 7. 10. that those treasons at common law, which are not within the declaration of 25 E. 3. yet remain felony, is not true, as might be made appear by many instances.

And upon the same account it seems, that altho by *Fleta* and *Briton*, if a man find casually the great seal, and seal a forged charter, this was treason at common law; yet it is neither felony nor treason at this day, for here is no counterfeiting of the great seal, it is therefore only a great misdemeanor. Co. P. C. p. 16.

And altho it seems by the old books above cited, that counterfeiting of the judicial seal of the king used for writs was then treason, yet very lately in the king's bench it was ruled to be no felony at this day, but only a great misdemeanor punishable by fine and imprisonment, or by standing in the pillory, or both, so that the book of 3 H. 7. is not in all points agreeable to law, for many things were treason before 25 E. 3. which are thereby declared not to be treason, and yet remain not felony at this day; and the like for counterfeiting the seal of a statute merchant.

If a man grave the sculpture of the great seal without warrant from the king, but never use it or apply it to seal any thing, this seems to be no counterfeiting of the great seal, tho it be with design and preparatory to such an attempt; for tho in truth the instrument itself be the seal, as appears by the usual expression *sigillo meo sigillat'*, and by the frequent proclamations *de sigillo amisso*, when either the king or a subject lost his seal casually, yet it seems not a seal within this statute till an impression made in wax in testi-

mony

mony of some writing, no more than the forging of a stamp for money is a counterfeiting of money, unless it be used, tho in both cases it is a great misdemeanor and a great evidence to prove the offense committed, if any other circumstances concur to prove it done.

M. 16 Jac. B. R. One counterfeited the draught of a patent to himself and others to compound with alehouse-keepers and usurers touching their offenses, and counterfeited the privy signet to warrant the passing of the other commission so by him drawn, and collected divers sums of money thereby, and for counterfeiting the privy signet he was indicted of high treason upon the statute of 1 Mar. It was resolved, 1. That the counterfeiting of the great seal, privy seal, sign manual, or privy signet is at this day high treason. 2. That the adding of the crown in the counterfeit signet, which was not in the true, and the omission of some words in the inscription, which were in the true signet, and the inserting other words, which were not in the true, (which was done purposely, that there might be a difference between the true signet and the counterfeit) alters not the case, but it is high treason, for the fixing of the counterfeit signet, and thereby obtaining the great seal to his feigned patent, and thereby publishing it to be true, and collecting sums of money by it make it treason; the offender had judgment to be drawn, hanged and quartered. (o)

So that it should seem, that tho there might be so great a disparity between the true and counterfeit signet, that the bare affixing of such a seal might not be a counterfeiting within the statute; yet if it were so like, that it deceived the officers of the great seal, and was used to that purpose, and attained its effect, viz. the affixing of the great seal to the forged commission, it was a sufficient counterfeiting to bring him within this law of 1 Mar.

The like *mutatis mutandis* may be applied to the great or privy seal.

(o) This case is reported in 2 Rol. Rep. 50. by the name of *Robinson's case*.

If a man counterfeit the stamp of the great seal, and deliver it to *B.* to use, *B.* being ignorant that it is a counterfeit stamp, but thinking it true, seals a writ or commission, this seems not to be treason in *B.* because he did it not *proditorie*, but it seems to be treason in the deliverer, if he deliverd it to that purpose, for he did it *proditorie*, but the other not.

III. I come in the last place to consider the judgment in the case of counterfeiting of the seal, whether it be only to be drawn and hanged, as in the case of counterfeiting money, or to be drawn, hanged, beheaded, &c. as in the case of compassing the king's death, levying of war or adhering to the king's enemies.

It seems that at the common law this offense was felony or treason at the king's election, if the indictment ran only *felonice* it was only felony, if *proditorie* it was treason. (*p*)

But altho it were *proditorie* and so applied to treason, it was not a treason of so deep a die, as that of compassing the king's death, adhering to the king's enemies, or levying war, which strikes at the head, and therefore in comparison thereof it was a kind of petit treason.

Claus. 6 Joh. M. 12. dorf. "Scias quòd dedimus *Adc* de " *Essex* clerico nostro pro servitio suo omnia terras, tene- " menta & jura, quæ fuerunt *Willielmi de Strubby*, cujus terræ " & tenementa sunt eschaeta nostra per feloniam, quam " fecit de falsificatione sigilli nostri." *Et nota* the king had the escheat, yet the offense was styled felony.

At the parliament 18 E. 1. Co. P. C. p. 16. Clergy was allowed to a man convict *pro falsificatione sigilli regis, deliberabatur ordinario* (*q*), but *in tali casu non admittenda est purgatio*;

B b b

and

(*p*) Co. P. C. p. 15.

(*q*) This is confirmed by *Phillip Burdon's* case, (*P. 18 E. 2. B. R. Rot. 25. Rex. South*) who together with *Richard de Bourne* was indicted, *Quòd nequiter & seditiosè contrafecit sigillum de metallo ad modum magni sigilli regis, de quo quidem sigillo contrafacto diversa brevia quamplurima consignavit*; he pleads,

quòd clericus est, the jury find him guilty *de feloniam & seditioe predictis ei impositis*, and he was thereupon deliverd to his ordinary; *tanquam clericus convictus*; from hence it appears that at common law clergy was allowed in cases of treason, where it was not immediately against the king's person.

and yet in these greater cafes of treason of levyng war or compassing the king's death clergy was not allowed at common law. T. 21 E. 3. B. R. Rot. 23. Rex. (r)

M. 1 E. 3. Charter de Pardon 13. (f). A man arraigned for counterfeiting the king's seal pleaded a charter of pardon of all felonies, and it was allowed; yet there it is agreed, that the judgment for such an offense is, that he shall be drawn and hanged, but such a pardon will not serve in such a case since the statute of 25 E. 3.

Trin. 10 E. 2. Rot. 132. B. R. Bucks. " *Robertus Legat &*
 " *Johannes Salecok* per ballivos coram rege ducti ad respon-
 " dendum domino regi de hoc, quod ipsi cum aliis ignotis
 " in pleno mercato villæ de *Olneye*, cum quadam falsa com-
 " missione & ficta cum quodam sigillo regis controfacto sig-
 " nata, quam ballivi in curia regis hic porrexerunt, asse-
 " rentes illam super eos inveniri die, quo attachiati fuerunt,
 " & dicentes, quòd virtute illius commissionis prisas fecerunt
 " ad opus domini regis, usque ad summam sexaginta bestia-
 " rum, de quibus quatuor bestiæ inventæ fuerunt in eorum
 " possessione & cum eis hic ductæ; they both plead not
 " guilty; the jury find *John Salecok* guilty de falsitatibus & fe-
 " loniis prædictis, judgment given against him pro falsitate
 " sigilli regis & commissione prædictis quod detrahatur &
 " pro furtiva abductione prædictarum bestiarum suspen-
 " datur."

4

Nota,

(r) That case was thus, *Peter de Thorpe* son of *John de Thorpe* was indicted, and afterwards outlawed anno 18 E. 3. pro diversis felonis & seditionibus, viz. going to little *Yarmouth* and *Gorleston* cum tribus vexillis extensis in modum guerre, breaking open houses there, feloniously taking away goods there, &c. and also five ships, "Quæ præparatæ erant de victualibus & aliis necessariis eundi cum domino rege in guerra sua, &c. Afterwards coram rege quæsitum est vel dicere sciat, quare ad executionem judicii de eo super utlagaria prædicta procedi non debeat, &c. Qui dicit,

" quòd clericus est & membrum sacræ ecclesiæ, &c. Et quæsitum est sæpius ab eo, si quid aliud velit dicere pro responsione in retardationem judicii, &c. Qui dicit, ut prius, & nihil aliud respondet, &c. Et inspectis indictamentis prædictis, & etiam recordo & processu utlagar' prædictæ manifestè compertum est in eisdem, quòd utlagar' prædicta super articulo seditionis promulgatur, in quo casu prædictus *Petrus* privilegio clericali gaudere non potest secundum legem & consuetudinem regni, &c. Ideo idem *Petrus* distrahatur & suspendatur, &c. (f) 1 E. 3. 23. b.

Nota, an arraignment of treason without indictment upon the *mainouer* (t) found upon them: *vide* P. 21 E. 3. B. R. Rot. 46. *Midd' Rex*.

According to the old books above-mentiond, *Fleta, &c. ubi supra, distrahi debet & suspendi*; and so it was practis'd in the case of 2 H. 4. above-mentiond, where the judgment is only *distrahi & suspendi*.

And it may be reasonably argued, that as in the case of counterfeiting the king's coin, which was a treason at common law, tho it be so declared by the statute of 25 E. 3. yet the judgment, that was at common law, which was only to be drawn and hanged is not altered by that statute, M. 10 Car. B. R. *Morgan's case* (u): so in case of counterfeiting the seal; but at this day the law is generally held, that for counterfeiting of the great or privy seal, or of the privy signet or sign manual, the judgment is to be hanged, beheaded and quartered, as in other high treasons, and so was the judgment in the case of 16 Jac. above-mentiond; and it is safest to follow the modern practice in judgments of high treason, tho I think it no error, if the judgment be only, *quòd distrahatur & suspendatur*, according to the antient precedents, because the judgment is still capital, and tho it be less, than the highest judgment in treason, yet it is still included in it.

CHAP.

(t) See for this kind of arraignment, 7 H. 4. 43. b. S. P. C. 148. c. 2 Co. Inst. 188. (u) Cro. Car. 383.

C H A P. XVII.

Concerning high treason in counterfeiting the king's coin, and in the first place touching the history of the coin and coinage of England.

THE Legitimation of money and the giving it its denominated value is justly reckon'd *inter jura majestatis*, and in *England* it is one special part of the king's prerogative.

Before I enter into the particulars concerning money I will give a history or narrative of the various states and conditions and changes of money in the several ages of this kingdom, and then shall descend to some more particular observations, which will be useful in this business.

Money is the common measure of all commerce almost through the world; it consists principally of three parts; 1. The material, whereof it is made. 2. The denomination or extrinsic value. 3. The impression or stamp.

I. The material in *England* is either pure silver, or pure gold, whereof possibly some money was antiently made here in *England*, or else silver or gold mixed with an alloy, which was usually and is hitherto a small proportion of copper.

The standard of the money of *England*, that hath for many ages obtain'd, is that, which is commonly called *Sterling* (a) gold or *Sterling* silver, for tho the denomination of *Sterling* was at first applied to the coin of silver and to that coin,

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(a) Some imagine this word to come from the town of *Sterling* in *Scotland*, where they pretend the purest money was formerly made; others that it is derived from the *Saxon* word *Steere*, which signifies rule or standard; others

that it was taken from some *Flemish* workmen, who in the reign of king *John* were invited over to reduce the money to its proper fineness; the people of that country being generally called *Easterlings*.

coin, which was the penny commonly called *Sterlingus*, yet use hath made it applicable not only to all kind of *English* coin of silver, but also to coin of gold, and this is called the standard of coin.

But before this can be well understood, we must make some digression touching the measures applicable to these materials.

In silver the measure or weights applicable thereunto are principally these :

1. The pound, which being not *averdupois*, but *troy* weight consists of twelve ounces:

2. The ounce consisting of twenty penny weight.

3. The penny or *Sterling* consisting of thirty-two grains of wheat taken out of the middle of the ear.

This is the old *compositio mensurarum* settled in the time of E. 1. (b) *viz. quod denarius Angliæ, qui denominatur Sterlingus rotundus, sine tonsura ponderabit triginta duo grana frumenti medio spicæ, & viginti denarii faciunt unciam, & duodecim uncie faciunt libram, & octo libræ faciunt gallonem, & octo gallones bussellum.* (c)

And it is to be remembred, that at that time a penny did really weigh the twentieth part of an ounce of silver, and twenty pennies did really weigh an ounce of silver, and two hundred and forty pence did really amount to a pound weight troy, and to twenty shillings, which made a pound of silver coin.

And altho at this time the coin is raised, and therefore varies from what it was at that time, yet to this day twenty shillings in silver is called a pound, and the measure of an ounce is by twenty penny weights according to the old proportion; but indeed the grain is changed (*), for whereas thirty [two] grains of corn then made an ounce [a penny weight], yet because the weight of corn is not always uniform, and

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(b) An old leiger book of the abbey of St. *Edmundsbury* says the affair was thus settled in 3 E. 1. by *George Rockley* then mayor of *London* and master of the mint; and in the 28 E. 1. an indented trial-piece of the goodness of old *Sterling* was lodged in the exchequer, and every pound weight troy of such silver was to be shorn at twenty shillings and

three pence. See *Tindal's* note on *Rapin's* history *sub fine Ed. 1.*

(c) *Vide* statute 31 E. 1. 2 *Co. Instit.* 577.

(*) There being, as I apprehend, two or three mistakes in this paragraph, I was not willing to vary from the original *MS.* but have inserted in brackets what I think was intended.

the number of thirty [two] was not so ready and easy for computation; the penny weight is now divided into twenty-four equal parts, which are commonly in the business of the mint called grains.

But touching the measure of gold there is some difference in relation to coin from that of silver, for we are told by the *liber ruber scaccarii* in that large tract concerning money, that the pound of gold consists of twenty-four carets, every caret weighing half an ounce of silver, and every caret consisting of four grains; and consequently every grain of gold would weigh sixty of those grains, which we call grains of silver, viz. the artificial grains, whereof twenty-four made the penny weight. (d)

Now the *Sterling* standard was antiently, as it seems, somewhat different from the standard as it is at this day, and for some hundred of years before; for from the 46th year of *Edward III.* and for some time before until this day the standard of *Sterling* silver hath been and is this, viz. every pound of *Sterling* silver hath eleven ounces two-penny weight of fine silver, and eighteen penny weight of copper, which makes the allay of *Sterling*; but because there cannot be so exact an observation of the proportion, a half-penny weight of copper over or under is allowed for the remedy, which is the cause that Sir *John Davis* in the case of mixt monies, fol. 24. b. saith, that eighteen shillings and five pence half-penny *argenti purissimi continentur in quâlibet librâ, & quælibet libra de Sterling money avoit 18 d. ob. de allay de coper, & nient plus.*

But before that time it appears by the red book in the exchequer, (which was written before 46 E. 3. and after 23 E. 3.) the standard of *Sterling* silver consisted of eleven ounces four penny weight of fine silver, and sixteen penny weight of copper, so that then the standard was purer; and possibly by what follows it may appear, that in the time of *Henry II.* the standard was purer, than that, for then there was allowed only twelve-pence upon the pound of silver *dealbare firmam* (e), which possibly might be to reduce it to fine silver, but this is obscure; *de hoc postea.*

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(d) If 1 caret = 4 grains = $\frac{1}{2}$ ounce = 10 penny weight = 60 grains of silver, then $\frac{1}{4}$ caret = 1 grain =

(e) *Mat. Paris* 747.

The standard of *Sterling* gold in the latter end of E. 3. (f) was, that a pound of *Sterling* gold consisted of twenty-three carets, three grains and a half of pure gold, and a half grain of allay of copper, and thus I think it continues to this day; and by this we may understand the statute of 17 E. 4. cap. 1. and 4 H. 7. cap. 2. by the former it is provided, that no goldsmith sell any gold under the fineness of eighteen carets, nor silver under the allay of *Sterling*; by the latter, that all silver, that shall be fined or parted, be made so fine, that it may bear twelve penny weight of allay in a pound weight, and yet be so good or better than *Sterling*.

And this is the dignity of the coin of *England*, that it hath been generally of the allay of *Sterling*, (except some small interruptions, whereof hereafter) and according to this it was enacted 25 E. 3. cap. 13. that the money of gold and silver, which now runneth, shall not be impaired in weight or allay, but as soon as a good way may be found, the same be put into the antient state, as in the *Sterling* made upon the petition of the commons. *Rot. Par.* 25 E. 3. n. 32.

II. As to the second essential of coin it is the denominated or extrinsic value, which is and of right ought to be given by the king, as his unquestionable prerogative (g), and that is seen in these particulars.

1. In the first institution of any coin within this kingdom he, and he alone sets the weight, the allay, the denominated value of all coin; this is done commonly by indenture between the king and the master of the mint; *de quo postea*.

And tho by special charter or usage divers prelates and monasteries in *England* had a certain number of stamps for the coinage of money, as the abbot of *St. Edmundsbury*, *Claus.* 32 H. 3. m. 15. *dors.* the archbishop of *York*, *Claus.* 5 E. 3. part. 1. m. 19. and likewise the archbishop of *Canterbury*, the bishop of *Durham*, the bishop of *Chichester*, &c. *de quibus vide* statute 14 & 15 H. 8. cap. 12. yet they had only the profit of the coinage, and the residence of some coiners at their cities, but they had not the power of instituting either the allay, the denomination, or the stamp; the stamps were usually

(f) See *Tindal's* note on *Rapin's* history *sub fine* Ed. 5. (g) *Plo. Com.* 316.

usually sent them by the treasurer and barons of the exchequer by the king's command under his great seal, and the masters or chief officers employed therein were sworn to the king for the just execution of their places. *Claus. 5 E. 3. part. 1. m. 10 & 19.*

But those mints have been long disused, tho it should seem by the statute of 14 *H. 8. cap. 12.* above-mentiond, that the severall statutes made against exchange of money, other than at the king's exchanges, were not intended to prejudice these particular franchises of coinage.

2. He may by his proclamation legitimate forein coin, and make it current money of this kingdom according to the value imposed by such proclamation; but the counterfeiting of such money was not treason, till the statute of 1 *Mar. cap. 6.* made it so, nor the clipping, washing, impairing thereof was not treason till 5 *Eliz. cap. 11.* and 18 *Eliz. cap. 1.* but all these statutes allow the power of legitimation thereof to the king by proclamation. (*b*)

3. He may inhanse the external denomination of any coin already established by his proclamation, and thus it hath been gradually done almost in all ages, as will appear by what follows in this chapter; this is sometimes called imbasing of coin and sometimes inhaning it, and it is both, it is an inhaning of coin in respect of the extrinsic value or denomination, but an imbasing in regard of the intrinsic value; as for instance, when in the time of *E. 4.* a noble was raised to a higher rate by twenty pence; *vide 9 E. 4. 49.*

4. He may by his prerogative imbase the species or material of the coin, and yet keep it up in the same denominated or extrinsic value as before, namely to mix the species of money with an allay below the standard of *Sterling*; this is the case of mixt monies in Sir *John Davis's* reports, where the case was this.

(*b*) See also 8 & 9 *W. 3. cap. 25.* and 7 *Ann. cap. 25.* whereby it is high treason knowingly to make, mend, buy, sell, or have in possession any mould or press for coining, or to convey such instruments out of the king's mint, or mark on the edges any coin *current*, or to counterfeit, or colour or gild any coin resembling the *current* coin of the kingdom.

April, 43 Eliz. Brett bought wares of one Gilbert a merchant in London, and became bound to him in 200 l. conditiond for the payment of one hundred pound Sterling current and lawful money of England in September following at Dublin in Ireland: 24 May, 43 Eliz. the queen sent into Ireland certain mixt money from the tower of London with the usual stamp and inscription, and declared by her proclamation, that it should be lawful and current money of Ireland, viz. a shilling for a shilling, and six-pence for six-pence, and that accordingly it should pass in payment, and none to refuse; and declared that from the 10th of July next all other money should be decried and esteemed only as bullion and not current money. Upon the day of payment Brett tendred the 100 l. in this mixt money, and resolved upon great consideration, that this tender was good, the place of payment being in Ireland, and the day of payment happening after the proclamation made; that altho this were not in truth Sterling, but of a baser allay, nor a money current in England by the proclamation, yet the payment being to be made in Ireland, it was as to that purpose current money of England; but if the day had been passed before the proclamation, then he must have answered the value, as it was when the payment was to have been made. Sir John Davis's reports, *case de mixt moneys.* (i)

It is true, that the imbasing of money in point of allay hath not been very usually practised in England, and it would be a dishonour to the nation, if it should, neither is it safe to be attempted without parliamentary advice; but surely if we respect the right of the thing, it is within the king's power to do it; for tho the statute of 25 E. 3. cap. 13. above-mentiond be against it, yet the statute doth not absolutely forbid it; and altho by Poyning's law 10 H. 7. all the precedent statutes in England are of force in Ireland, yet that resolution was given as above.

My lord Coke in his comment of *Articuli super cartas*, cap. 20. seems to imply, that the alteration of money in weight or allay may not be without act of parliament, and for that

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purpose cites the Mirror of justices (k), *Ordein fuit, qe nul roy de ce realme ne poit changer sa money ne impayre, ne amender, ne autre money faire, qe de ore ou de argent sans assent de tous ses counties*; and the act of 25 E. 3. cap. 13. the statute of 9 H. 5. sess. 2. cap. 6. that all money of gold and silver shall be as good weight and allay as is now made at the Tower: the parliament-roll of 17 E. 3. n. 15. (l), which was an accord in parliament for the present amendment and increase of coin *de fayre une mony des bones Esterlinges en Engleterre du poys & allay del auntient Esterlinges, qe avera son course in Engleterre enter les graunts & commons de la terre*, which should not be exported; and if those of *Flanders* would make money of as good an allay as *Esterlinges*, that it should be current between merchant and merchant here and others, that would receive it, which was a temporary provision for the increase of money.

All that a man can conclude upon these is, that it is neither safe nor honourable for the king to imbase his coin below *Sterling*, if it be at any time done, it is fit to be done by assent of parliament, but certainly all that it concludes is, that *feri non debuit*, but *factum valet*, and this appears,

1. By that resolution in the case of mixt monies, which, tho it were but by way of advice and in *Ireland*, is of great weight, especially if we consider the consonancy thereof to the practice in *Ireland*, which tho it hath the same law of 25 E. 3. in force there, yet generally their coin current there was of a baser allay than *Sterling*, even before the proclamation of 43 *Eliz.*

2. By the usual inhanfing of the coin in point of value and denomination here, which tho it be not absolutely an imbasement of the coin in the species, yet it hath very near the same effect.

3. By the attempts that have been made to restrain the change of coin without consent of parliament. Among those many provisions by the lords ordeiners, 5 E. 2. n. 30. that much abridged the king's power, this was one, *pur ceo qe a tous les foys qe le change de mony se fait en royaume, tout le peo-*
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(k) cap. 1. §. 3.

(l) See Co. P. C. p. 93.

ple est grandment grievéz in molts des manners, nous ordeinams, qe quant mestier serra & le roye voile échange faire, qil la face par common counsell de son baronage & ceo en parlement.

But these ordinances, and this among the rest was repeald in parliament E. 2. and never revived again.

Rot. Par. 20 E. 3. n. 17. “Item qe les receivers des pay-
“ments nostre seigneur le roy receuent de people en chescun
“place auxi bien or come argent al prise assise desicom le
“people est arte de cel receiver pur payment, & qe la
“change de mony de or ne dargent ne se face sans assent de
“parlement. Ro’. Quant aprimer point de c’article foit tenuz;
“quant a les changes fair soit l’article monstre a nostre seig-
“neur le roy, & as graunts qe sont perdervers lui, qils ent
“ordeignent & dient lour volunte.

King *Henry VIII.* imbased the coin of this kingdom in point of allay, and so it continued during the residue of his reign, and during the reigns of *Edward VI.* and queen *Mary*, in so much that the penny had not above a half-penny of intrinsic value; but queen *Elizabeth* among the rest of her excellent methods of government did by little and little rectify this detestable imbasement of coin, 1. By prohibiting exportation, and melting down of good silver. 2. By reducing the brass money to its intrinsic value. 3. By making a good allowance (to her own los) of the base money brought into the mint. 4. By stamping of new money of just allay of *Sterling*: *Camd. Eliz. sub anno 1560. p. 48.*

While I wrote this a proclamation hath issued dated 16 *Aug.* 1672. whereby copper coin of half-pence and farthings near the intrinsic value is proclaimed in these words: “We
“do by this our royal proclamation declare, publish and au-
“thorize the said half-pence and farthings of copper so coin-
“ed, and to be coined, to be current money, and that the
“same from and after the 16th of *Aug.* shall pass and be
“received in all payments, bargains and exchanges to be
“made between our subjects, which shall be under the value
“of six-pence, and not otherwise nor in any other manner;”
how far this makes it current money, *videbimus infra.*

And thus far touching the power of denomination, or setting the extrinsic value upon coin; the manner how this is done will be shewn hereafter.

III. The *third* essential in coin is the stamp or impression, for tho it may be possible, as Mr. *Stowe* says, that in antient time money passed in *England* without a stamp or impression, yet I never read any such thing since the conquest, for that, which is frequently called blank money, was not money without impression, but white money or pure silver, or at least *Sterling* silver coined, for otherwise it had not been an apt measure for commerce: the stamps or impressions of current money were heretofore deliverd to the master of the mint from the exchequer, but of later times they are deliverd by the secretary sometimes with, sometimes without the indenture of coinage: now touching the manner of the legitimation of coin in *England*, it is sometimes by proclamation, but always by indenture between the king and the master of the mint.

And therefore where Sir *John Davis* in the case *ubi supra* (*m*) makes these six things as essentials to the legitimation of coin, 1. Weight. 2. Fineness. 3. Impression. 4. Denomination. 5. Authority of the prince. 6. Proclamation. The last is not always necessary to the legitimation of coin, for there is scarce any king's reign, but that there are various stamps or impressions of money, which were never proclaimed, and therefore if upon an indictment of clipping or counterfeiting the king's coin it be questioned, whether it be the king's coin or no upon the evidence, there is not a necessity of proof thereof by a proclamation, but it is a meer question of fact, which must be left upon the jury by circumstances of fact to find, whether it be the king's money; for tho there might be possibly proclamation of some new coins in the beginning of kings reigns, yet it would be impossible to prove them in the antient coins of *Edward VI.* queen *Mary*, queen *Elizabeth*, &c. but if necessary to be supposed, they may be presumed *ex diuturnitate temporis*; the most therefore that can be expected is to produce the officers of the

mint or their indenture to prove a coin current, if it be not otherwise commonly known.

But proclamation is necessary in these cases following.

1. A proclamation with a proclamation-writ under the great seal is necessary to legitimate and make current foreign coin, and without the proclamation it is neither current coin of this kingdom, nor is the counterfeiting, clipping or diminishing thereof treason within the statute of 1 Mar. or 5 or 18 Eliz. for the words in these statutes (*and by proclamation allowed and suffered to be current here*) refers only to foreign coin, not to the coin of this kingdom; but tho it be not proclaimed, it is misprision of treason to counterfeit it by the statute of 14 Eliz. cap. 1.

The reason is especially because by the statute of 17 R. 2. cap. 1. no foreign coin of gold or silver are to run in any manner of payment within this realm, but are to be brought as bullion to the mint to be turned into *English* coin.

2. A proclamation under the great seal is necessary to legitimate base coin or mixt below the standard of *Sterling*, and for the dispensing within the statute of 25 E. 3. cap. 13. and 4 H. 5. cap. 6. and with application to that case the opinion of Sir *John Davis's* report touching the necessity of a proclamation seems to be good in law.

3. A proclamation under the great seal is necessary, when any coin already in being is inhanst to a higher denomination or extrinsic value; as when the twenty shillings piece of gold was raised to twenty-two shillings, because it was once current money under another denomination; thus it was done upon the inhansting of twenty shillings and ten shillings pieces by king *James*.

4. A proclamation is necessary when any money, that is current in usage or payment, is decried; thus it was done in the case of 43 Eliz. for the *Sterling* money in *Ireland* before mentiond; and thus it was done by the *Pollards* and *Crocards* *tempore* E. 1. (n), Dy. 82. and by the several base monies mentiond in *Articuli de moneta*, namely the money with the mi-

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(n) *Davis* 21. l. See the note in *Rapin's* hist. sub fine Ed. 1.

tre and with the Lyons, which it seems were minted in *England*, besides the other foreign money therein mentioned. (o)

5. Altho in the case of money newly coined by the king's authority in *England* a proclamation is not absolutely necessary to the legitimation thereof or making it current, yet to induce a contempt upon such as refuse to take it in payment such proclamations have not been altogether unusual, and by the red book of the exchequer seems necessary for that purpose; for how can men reasonably know at first, whether this be the king's coin without some such public notification, where long use and custom hath not made the stamp or coin familiarly known to those, that are to receive it: *vide* proclamations for money newly made principally upon this account, *Claus.* 18 E. 3. part 1. m. 28 & 12. *dors.* *Claus.* 18 E. 3. part 2. m. 14. *dors.* *Claus.* 19 E. 3. part 1. m. 23. & part 2. m. 15. *dors.* *Claus.* 20 E. 3. part 2. m. 20. *dors.* and 25 E. 3. m. 14. *dors.* But yet the money is the lawful money of *England*, and he that counterfeits it is within the law of 25 E. 3. for treason, tho there be no such proclamation: *vide Lib. Rubr. Scaccarii, fol. 259.* “Imprimis oportet ut omnem monetam
 “præcedat constructio allaii, viz. ponderisque & numeri ipsius
 “monetæ distincte & apte continens moderamen, deinde
 “inchoanda est & perficienda ex edicto aut licentiâ principis
 “speciali, & publicanda per proclamationem præconis ipsius
 “principis publice, ut mos exigit faciendum, & tunc usui
 “apta erit: ita ut ex tunc non sit impune a quoquam de
 “populo recusanda. Quicumque autem clam vel aperte vel
 “palam absque licentiâ principis cujuscunque monetæ contra-
 “factionem attemptasse convictus fuerit, corporaliter plecti
 “solet.”

And now I shall give a brief history of the variation of the coin of *England*.

It appears by all the antient monuments, that I have seen, that the use of coin or money was antient and long before the conquest. (p) It

(o) And thus it was lately done in the case of the broad pieces of twenty-five shillings and twenty-three shillings.

(p) That money was coined here in the time of the *Saxons* is sufficiently plain, but it is very doubtful whether the

It is true that *Gervafius Tilburiensis*, who wrote the black book of the exchequer in the time of *Henry II.* commonly called *magister & discipulus*, *Lib. I. cap. à quibus & ad quid instituta fuit argenti purgatio*, says, that in the times of king *William I. William II. and Henry I.* the antient farms of the king's demefnes were answered in cattle, corn, and other provisions in specie, because it saved the king the trouble of purveyors, and money was scarce among the people, and yet the reservations of their rents were in money, *viz.* so many pounds *numero*, or so many pounds *blanc*; *de quibus infra.*

And to make an equation between the provisions, that were answered in kind, and the rents that were reserved, there were certain rates or prices agreed upon almost all such provisions, as for wheat for one hundred men *per diem* twelve pence, for a fat ox twelve pence, &c. which it seems were deliverd to the sheriff, and by him answerd to the king in money or kind, as it was agreed.

But those farm rents, that were reserved out of the cities, boroughs, franchises, &c. because they had not provisions in kind were answered in money according to their reservations.

In the time of *Henry I.* this answering of farms by provisions ceased, and the tenants paid their money according to the letter of their reservations; the king was weary of receiving, and the farmers weary of paying their rents in victuals and provisions, but money still was in use as the common instrument of commerce and valuation.

In the troublesome time of king *Stephen* we are told by *Roger Hoveden sub anno 1149. Omnes potentes tam episcopi, quam comites & barones suam faciebant monetam*, which occasioned a great confusion and corruption in money and commerce (q): *Henry II.* coming to the crown reformed this usurpation and abuse, *novam fecit monetam, quæ sola accepta erat & recepta in regno* (r); and thus it hath hitherto obtaind, only some particular

the Britons ever coined any; in *Cæsar's* time they used only iron-rings, or pieces of brass; *Cæsar. Com. de B. G. lib. 5. n. 12.*

(q) *William of Newbury* writes thus under the reign of king *Stephen*, *Frant*

in Anglia quodammodo tot reges vel potentius tyranni, quot domini castellarum, habentes singuli percussuram proprii numismatis.

(r) See *Wilk. Leg. Henry II. p. 320.* where these words are also added, *abdicata*

ticular corporations ecclesiastical, as bishops and abbots had special privileges granted to them to have mints (*f*), some one stamp, some two, some more, which yet were sent to them from the king's exchequer, and their officers sworn to the king to deal faithfully in their offices.

Yet after this king's time, especially in the beginning of king *John's* time, there was a great uncertainty and disorder both in the weight and allay of coin; for *Claus. 7. Johann. m. 24. Sciatis quòd recepimus per manum Petri de Ely, &c. trecentas libras numero, que ponderabant quingentas libras 47 s. 8 d.* and in the same roll, *m. 25. recepimus de Thesauro per manus Petri de Ely, 1725 l. & 11 s. 6 d. numero, que ponderabant 1556 l. 17 s. 6 d.* which holds no proportion with the former.

Henry III. had a troublesome reign, and malefactors abounded especially in relation to the clipping of money; in his thirty-second year he made new money, and ordained *ne quis denarius, nisi legitimi ponderis & circularis formæ uteretur*, clipped money not being to be received but perforated, and divers offenders were hanged. *Mat. Paris sub anno 1248. (t)* but we have not the just standard or weight of his money.

In the time of *Edward I.* we know what the weight and allay of his current money was, namely the allay was *Sterling*, twenty shillings made a pound weight troy, and twenty pence an ounce, so that the pound of *Sterling* silver made two hundred forty *Sterling* pence.

There were other base monies in his time, as namely, those that were decried by the *Articuli de monetâ*, and *Pollards* and *Crocards*; what the value of the latter was I know not, but it appears by *Claus. 28 E. 1. m. 6. quòd pro quâlibet libra pollardorum una marca Sterlingorum solvitur ad Scaccarium*: they were both decried in the 28 E. 1. (*u*). *Vide Dy. 81.* This rate of *Sterling* continued during some time of *Edward II.*

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jam procerum illa; the truth is, this reformation of the money began to be made towards the latter end of *Stephen's* reign, for among the articles of peace between *Stephen* and *Henry* this was one, that the silver coin should be one and the same throughout the kingdom. *Ibid. f. 315. Mat. Paris, p. 139.*

(*f*) See a charter of king *John* allowing this privilege to *Hubert* archbishop of *Canterbury*. *Wilk. Leg. Johannis, p. 355.*

(*t*) *p. 747.*

(*u*) As appears by the proclamation, *Quod Pollardi & Crocardi non curraut in regno Angliæ. Claus. 28 E. 1. m. 12. dorf.* by which record it also appears, that

I have not seen any indentures of the mint between the time of *Edward II.* and the 46 *Edward III.* (x), and then by the indenture of the mint *Claus. 46 E. 3. m. 18.* a pound of gold made forty-five nobles, each noble six shillings and eight pence, and was to consist of twenty-three carats, three grains and an half of fine gold, the rest allay; the coinage to be four shillings for each pound for the master of the mint, and twelve pence for the king; the pound valued at fifteen pounds, and the merchant upon the return to have out of the *Tower* fourteen pounds fifteen shillings.

A pound of silver was to make three hundred pence, and so in that proportion groats, half-pence and farthings, which was to be of the allay *du viel Esterling*, viz. eleven ounces two-penny weight of fine silver, and eighteen penny weight of allay, eight pence to be allowed for coinage.

The next Indenture I find is 3 *H. 4. p. 2. m. 9. dorf.* whereby a farther alteration was made.

The pound of gold made the same quantity of nobles, and was of the same allay as before, only upon every pound was allowed three shillings and six pence to the master, and one shilling and six pence to the king for coinage.

The silver coin of the same fineness, weight and allay, as by the indenture of 46 *E. 3.* the coinage eight pence, whereof seven pence to the master, and one penny to the king upon every pound weight.

Claus. 1 H. 5. m. 35. dorf. the allay of gold and silver still the same as before, but some other variance there was.

The pound of gold was now to make fifty nobles, the value of the whole pound to be sixteen pounds thirteen shillings and four pence, the coinage five shillings.

F f f

The

that two *Pollards* and one *Sterling* were much about the same value; for the words are *Licet nuper pro communi utilitate regni nostri de concilio nostro ordinavimus, quod duo Pollardi, vel duo Crokardi currerent in eodem regno pro uno Sterlingo.*

(x) But among the records in the

Tower there are several indentures to be found within that time, viz.

Claus. 18 E. 3. p. 2. m. 19. d.

Pat. 18 E. 3. p. 1. m. 27.

Claus. 23 E. 3. p. 1. m. 21. d.

Claus. 25 E. 3. m. 15. d.

Claus. 29 E. 3. m. 6. d.

Claus. 35 E. 3. m. 12. d.

The pound of silver was to make three hundred and sixty pence, the coinage was nine pence to the master, and three pence to the king; so that now the pound of silver made thirty shillings *Sterling*, which began in *Rot. Parl.* 13 *H.* 4. *n.* 28. by ordinance of parliament.

Claus. 9 *H.* 5. *m.* 2. *dors.* the same weight and allay of gold, *viz.* every pound of gold to make fifty nobles, the coinage to the king three shillings and six pence, to the master eighteen pence.

The like as to silver in all points as by the indenture of 1 *H.* 5. only the master to have nine pence, the king three pence for coinage.

Claus. 1 *H.* 6. *m.* 13 & 15. The indenture agrees in all things with that of 9 *H.* 5.

Claus. 4 *E.* 4. *m.* 20. The king by proclamation inhanfeth the value of coin, so that the noble of gold, which before was six shillings and eight pence, is now raised to eight shillings and four pence, three groats make a shilling, and so do twelve pence, and twenty shillings make a pound.

And afterwards he made new coins according to the standard of gold aforesaid, *viz.* the noble of gold eight shillings and four pence, and the pound of silver raised to thirty-seven shillings and six pence; and now I shall follow *John Stowe* in his *Survey of London*, p. 47.

H. 7. raised the rate of *Sterling* silver coin to forty pence the ounce.

18 *H.* 8. the pound of silver coin was raised to forty shillings.

35 *H.* 8. the coin of gold was raised to forty shillings the ounce, the coin of silver to four shillings the ounce, and coins of base money of allay below *Sterling* were coined, *viz.* shillings, six-pences, four-pences, two-pences, pennies: these were decried in 5 *E.* 6. and the shilling reduced to nine pence, and after to six-pence. (y)

30 *Octob.* 5 *E.* 6. Silver *Sterling* coin inhanfed to five shillings the ounce, and so proportionably; and coins of fine gold,

gold, a whole fovereign was thirty shillings, an angel ten shillings, and base money to pass as before.

2 *Eliz.* The base money was called in and brought to the mint and reduced to *Sterling* and new coined, and the drofs given to repair the highways.

16 *Novemb.* 2 *Fac.* By proclamation the new coins of gold and silver then made, together with their impressions, inscriptions, weight, and values were proclaimed; and 23 *Novemb.* 9 *Fac. per proclamation* the coins of gold are enhanced, *viz.* thirty shillings to thirty-three shillings, twenty shillings to twenty-two shillings, fifteen shillings to sixteen shillings, ten shillings to eleven shillings, five shillings to five shillings and six-pence.

Upon these variations these things are nevertheless observable, *First*, That the old *Sterling* gold is this, that one pound of *Sterling* gold contains twenty-three carets three grains and a half of fine gold, the rest to make it up twenty-four carets is of allay of copper. *Secondly*, That the old standard of *Sterling* silver is, that every pound weight of *Sterling* silver consist of eleven ounces two-penny weight of fine silver, and eighteen penny weight of allay of copper. *Thirdly*, That this rate of *Sterling* gold and silver hath most plainly continued to be the standard of *English* gold and silver coin, at least from the time of *Henry III.* until this day in *England* without any considerable alteration, saving that base money, which was stamp't in the time of *Henry VIII.* and then reduced to a lower valuation by *Edward VI.* and after re-established by *Edward VI.* to its former value. *Fourthly*, That, as well in *England* as *Ireland*, there hath been imbasing of the species of money, as appears in these two instances in the time of *Henry VIII.* and *Edward VI.* which are yet the only instances that I find of that nature in *England.* *Fifthly*, That queen *Elizabeth* decried by proclamation all that base money, which was in use in the time of her father and brother, and ever since that proclamation, *viz.* 2 *Eliz.* the true old *Sterling* standard both of gold and silver hath been the only standard of the *English* current money. *Sixthly*, That altho the standard of *Sterling* hath

hath with great constancy obtained in *England*, yet the denomination or extrinsic or imposed value hath varied according to the pleasure of the king both as to gold and silver coin, as appears by what goes before; for in *Edward I.*'s time the ounce of *Sterling* silver was twenty pence, the pound twenty shillings or two hundred and forty pence; in *Edward III.*'s time the pound of *Sterling* was three hundred pence; in the time of *Henry V.* and so downward to *Edward IV.* three hundred and sixty pence, or, which is all one, thirty shillings; in the time of *Edward IV.* the pound of silver was thirty-seven shillings and six-pence; in 35 *H. 2.* the pound of *Sterling* silver was forty shillings; in 5 *E. 6.* and so down to this day the ounce of silver five shillings or sixty pence, and the pound of *Sterling* silver three pounds or seven hundred and twenty pence, which in *Edward I.*'s time was only two hundred and forty pence, which now is thrice as much as then it was. *Seventhly*, That I find rarely any proclamation for the setting of the rate of new coin, but only as before, when the denomination of what is in being is increased, or abated, or recalled; so that the indenture of the mint and common reputation is that, which must try what is *English* money. *Eighthly*, That I never find either in the indentures of the mint or any proclamation the stamp, impression, or inscription described, unless in that of king *James*, because the stamps are agreed upon between the king and the master of the mint, and delivered to him by the king, or his warrant either of the great seal, privy seal, signet, or secretary of state.

C H A P. XVIII.

Concerning the adulteration or impairing of coin, and the antient means used to remedy it.

THE Decays or impairment of coin is either in weight or allay, the former may happen by some abuse of the moniers or minters, or by the subtilty of clippers, washers and other impairers of coin; the latter, *viz.* impairment in allay, can only happen either by the dishonesty of the moniers or minters, or by the counterfeiting of coin.

Antiently all money was paid in number, namely so many pieces made a pound, and this was the common reservation and account of all farms, and the estimating of accounts, *vicecomes A. reddit comptum de 100 l. numero*, or *in thesauro 100 l. numero*.

But this did not answer all intentions, for the money that was paid in might be clipt, or otherwise rendred light, or might be counterfeit, or of a base allay.

For remedy whereof there was practised these three methods of rectifications of payments at the exchequer, that the king might not be deceived, and these were successively used in the exchequer, which we may read *Gervas. Tilb. Lib. I. supra quibus*.

1. *Solutio ad scalam*, which it seems was a dish or measure, whereby they measured their money, as well as told it, for that is the proper signification of *scala*: but in process of time this was turned into a measure of money, which was an addition of six pence for every pound, to avoid the trouble of that probation, whereby an hundred pounds *numero* amounted to an hundred pounds and fifty shillings *ad scalam*; and so we have frequently in the old pipe-rolls of *Henry II. Richard I. king John, &c. in thesauro 100 l. ad scalam*.

2. *Solutio ad pensum*, which was the answering of every pound of money by weight of a pound weight troy, for in those times the *libra argenti* coin did or was to answer a pound weight troy, and therefore the payer was to make it good of that weight by answering the full weight; this gave the frequent title in the old pipe-rolls, also in *thesauro* 100 l. *ad pensum*.

But altho this *solutio ad scalam* or *ad pensum*, especially both together, did give some help against the defect of coin in weight, as by clipping, washing, or the like, yet it did not help as to adulterate money of baser allay than the standard: Therefore,

3. There was found out in the time of *Henry II.* a third trial, namely trial by fire or combustion, and if it were of the just allay it was allowed, if below the allay the payer was to make it good, and hence he was said *dealbare firmam*; and hence grew quickly a difference between reservations and payments of so much money *numero*, and so much money *blanc*.

A reservation of so much money generally was intended of so much *numero*, as if a pound were reserved, it was in effect but twenty shillings in *pecuniis numeratis*; but if it were expressly said so much money *blanc*, then it was answered in *blanc* money, but yet with this difference, that if a farm were letten and so much rent generally reserved, it should be intended so much *numero*, in *pecuniis numeratis*; but if a franchise or liberty were granted, and so much rent generally reserved without saying *blanc* or *numero*, it was commonly intended *blanc*, unless expressly said *reddendo* so much money *numero*, and therefore in such a case the former was bound *dealbare firmam*, that is to answer so much as would make his payment to be so much good in fine silver, or very near it at least, *Gervas. Tilb. Lib. II. cap. quid sit, quosdam fundos dari blanc, quosdam numero.*

And therefore upon all the antient accounts in the pipe made by the sheriff we shall find some of his accounts of rents to run *numero*, some of them to run *blanc*, viz. *firma comitatûs numero*, & *firma comitatûs blanc*, according to the variety

riety of their reservations or the things out of which they are reserved; now what the proportion was between so much money *blanc* and so much money *numero* in those antient times, or what this *blanc* money was, is worth the inquiring.

I have formerly thought that *blanc* money was nothing else but *Sterling*, and that *dealbare firmam* was no more, than to reduce money to the true allay of *Sterling*; but upon consideration I think *blanc* money was truly so much fine silver without any allay, and that the true allay of *Sterling* silver or the antient standard was twelve penny weight only of copper to every pound weight of silver; and therefore he, that upon his reservation was to pay one hundred pounds of *blanc* money, was to answer to the king upon every pound of *Sterling* money one shilling to countervail the value of the allay of copper in every pound weight troy of silver.

And hence it is, that the farms of most corporations antiently let with liberties, if one hundred pounds *per annum* were reserved, usually answered one hundred and five pounds, the five pounds being to answer the allay of one of copper in the whole quantity.

21 H. 3. *in compoto comitatûs North'ton summa totalis 102 l. 3 s. 7 d. de quo 4 l. 9 s. 4 d. blanc, que sunt extensæ ad 4 l. 13 s. 9 d. subtrahuntur ad perficiendum corpus comitatûs, & remanet 97 l. 13 s. 10 d. (a) de quibus respondet de proficuo in magno rotulo.*

Claus. 19 H. 3. p. 1. m. 2. Sciatis quòd pardonavimus dilectæ & fideli nostræ A. comitissæ Pembroch centum triginta & quinque libras blanc, que extensæ sunt ad 141 l. 15 s.

13 E. 3. *in compoto Bedford & Bucks, Nicholaus Basselew 18 l. 4 s. 4 d. numero pro 17 l. 7 s. blanc.*

That of 19 H. 3. exactly answers twelve pence *per pound*, which amounts to six pounds fifteen shillings, and added to one hundred thirty-five pounds make just one hundred forty; one pounds fifteen shillings.

And the other estimate is very near the same account, bating the difficulty of small fractions, four pounds nine shillings and

(a) This should be 97 l. 9 s. 10 d.

and four pence, with the adding of twelve pence for every pound to make it *Sterling*, amounts to about four shillings and six-pence, which added to four pounds nine shillings and four pence make four pounds thirteen shillings and ten pence; so the allay of *Sterling* at that time seems to be twelve pence of copper to every pound of silver.

The sum therefore is, 1. That *blanc ferme* or *blanc* money was the estimate of money in pure silver without allay, and accordingly it was to be answered, *viz.* one hundred pounds *blanc* was to answer one hundred and five pounds *numero*. 2. That a *ferme* or sum of money *numero* was so much *Sterling* money according to the standard of those times. 3. That the standard of *Sterling* money in those times was finer than it hath been since the time of *Edward I.* namely *Sterling* was then eleven ounces eight penny weight finer silver, and twelve penny weight of allay. 4. That when at the exchequer they burnt the money to make assay of it, in case twenty shillings *numero* were reserved, it sufficed if it held the allay of *Sterling*, *viz.* eleven ounces, eight penny weight of pure silver, and twelve penny weight of allay; but if it were reserved *blanc*, then tho good *Sterling* was brought to the test, yet it went for less than *Sterling* by twelve penny weight in every pound, and therefore they were to add five pounds in the hundred to make it up *blanc*. 5. But when this probation grew troublesome and *Sterling* money was well established, then they, that were to pay one hundred pounds *blanc*, paid one hundred and five pounds *Sterling*, as the common estimate of *blanc* money: it seems that in king *John's* time the standard of *Sterling* money was far lower and worse, than at any time before or after, especially towards the latter end of his reign.

The borough of *Wich* was antiently from the conquest till 17 *Johann.* held at the yearly rent of eighty pounds *per annum blanc*, which was answered by the sheriff in the times of *Henry II.* and *Richard I.*

7 *Johann.* the king granted the borough of *Wich* to the town at the farm rent of one hundred pounds *Sterling*: in

the pipe-roll of 24 H. 3. *homines de Wico reddunt compotum de 100 l. numero, pro 80 l. blanc*, which imports these sums to be equal, and afterwards 43 H. 3. *homines de Wico reddunt compotum de 80 l. blanc, que sunt extensæ ad 84 l.* and in 17 E. 3. this eighty-four pounds was raised to eighty-nine pounds five shillings *numero* upon the extent, which *ferme* of eighty-nine pounds five shillings they have ever since answered; whereby it appears the standard of *Sterling* was but low in king *John's* time, for eighty pounds *blanc* was in his charter estimated at one hundred pounds *Sterling*: again it was high in 43 H. 3. *viz.* after the rate of twelve penny weight of allay in a pound of fine silver, for there eighty-four pounds *Sterling* is rated to be eighty pounds *blanc*; and in *Edward III.* the standard was lower, than twelve penny weight of allay, *viz.* above twenty-four penny weight of allay and more in a pound weight of fine silver; but afterwards raised to eighteen penny weight of allay towards the latter end of his reign, which hath hitherto continued as the true standard of *Sterling* silver.

These curiosities, tho they be not much in use at this day, yet they are fit to be known for understanding the old rolls.

C H A P. XIX.

Concerning the counterfeiting of the king's coin what it is, what the penalty thereof antiently, and what at this day.

HAVING taken this compass I now descend to the offense itself, wherein I shall consider, 1. What is the coin or money of the king. 2. What a counterfeiting thereof. 3. What the punishment before this statute. 4. What the punishment since this statute.

I. What shall be said the king's money.

The money of a foreign kingdom is not the king's money within this act, and therefore at common law the counterfeiting thereof was only punishable as a cheat; and now by the statute of 14 *Eliz. cap. 3.* it is made misprision of treason to counterfeit any foreign coin of gold or silver, tho' not made current here by proclamation.

The money of a foreign kingdom made current by proclamation, tho' it be now as to all civil respects the proper money of this kingdom, yet as to the crime of treason it was not the king's money within this act.

And therefore a special statute was made, *viz.* 1 *Mar. cap. 6.* that if any person falsly forge or counterfeit any such kind of coin of gold or silver as is not the proper coin of this realm, and is or shall be current within this realm by the consent of the queen, her heirs or successors, then such offense shall be judged high treason.

This consent cannot be but under the great seal, *viz.* by proclamation and a writ under the great seal annexed thereunto; or some other sufficient notification under the great seal; and it must be of money of gold or silver, which I take to be a denomination *ex majore parte*, if it be such a foreign coin as is for the most part of gold or silver.

But even the counterfeiting in copper or brass gilt, or in tin or alchymy, if the exemplar itself be of gold or silver, is within this act of 1 *Mar. cap. 6.*

If the coin of *Ireland* doth not substantially differ in the signature or impression from the coin of *England*, the counterfeiting of that money here in *England* seems to be a counterfeiting of the king's coin here in *England*; but if the stamp or impression bear no such resemblance, as is easily discernible, then it is considerable, whether it be a counterfeiting of the king's coin here, for *Ireland* is a distinct kingdom from *England*, tho part of the dominions of the crown of *England*.

Yet it seems that it is treason within the act of 25 *E. 3.* 1. Because the words of the statute are *sa monoye*, and not specially the money of *England*, and money coined by the king's authority in *Ireland* is *sa monoye*, tho it be not the current money of *England*. 2. Because by the express words of the statute of 25 *Eliz.* the clipping of coin of this realm, or any the dominions thereof, is enacted to be treason; it is not to be supposed that the parliament would make the clipping of *Irish* coin treason, unless the counterfeiting thereof were treason; and with this the resolution of the case of mixt monies in Sir *John Davys's* reports agrees, *viz.* that the imbased coin stamp for *Ireland* is lawful money of *England* within the condition of a bond for payment of money in *Ireland*.

What shall we say concerning the farthings and half-pence of copper newly minted in *England* and proclaimed as before to be current money, is the counterfeiting thereof treason?

It is true in antient proclamations for farthing-tokens it was not usual to be, that it should be current money, but only that it should be used as tokens, and the punishment of counterfeiters was either in the star-chamber, or by information or indictment, and fine and imprisonment in the king's bench.

And yet it seems to me, that this proclamation makes it not the king's money within this act of 25 *E. 3.* 1. Because it is so made only to a special purpose namely in receipts and payments under six-pence, and not otherwise. 2. Because here is no dispensation or *non obstante* of the statute of 25

E. 3. Again, when by the statute of 25 E. 3. *cap.* 13. it is enacted, that the money of gold or silver, which now runneth, shall not be impaired in weight or allay, we can hardly think it ever intended that the copper money should be that money, which should be intended within the act made at the same parliament touching treason; but *quere tamen.*

If money be decried and varies signally from the stamp and impression in the coin that is commonly allowed, this is not money within this act, for it hath lost its denomination and legitimation by the king's proclamation. (a)

The money of an usurper bearing his stamp and effigies and inscription, is the king's money in the time of the succeeding rightful king, till it be recal'd by proclamation. If upon the evidence against any counterfeiter of the king's coin, tho it be but of a late coinage or impression, it comes in question whether the coin, that is counterfeited, were the coin of this kingdom, it is not necessary to produce a proclamation to prove its legitimation for these reasons;

1. Because where there were proclamations of coin they are for the most part lost, if we should be put to prove a proclamation for the coins of queen *Mary*, queen *Elizabeth*, where should we find them?
2. Because in most kings times there are variations of the impressions without any proclamation, or so much as a new indenture between the king and the master of the mint.
3. Because there are very few proclamations, except that before-mention'd in king *James's* time, that exprefs any more than the weight and allay, but the impression or effigies is rarely, if at all, expreffed, and so such proclamation would import little to ascertain the effigies or stamps; and for the same reason the indenture of the mint is not absolutely necessary, tho in some cases it may be useful.
4. Because especially in antient coins *ex diuturnitate temporis omnia præsumuntur ritè acta*, if proclamation or indenture be necessary, it shall be presumed in length of time, as a licence of appropriation shall be presumed by long continuance, tho not shewn.

The

(a) For this reason, when the broad pieces were cried down, and the officers of the revenue charged to take them in payment for one year after, it was thought necessary by a special act of parliament 6 Geo. II. *cap.* 26. to make the counterfeiting of them during that year treason.

The question therefore, whether the coin that is counterfeit be the coin of this kingdom, is a question of fact, which upon evidence of common usage, reputation, &c. may be found to be *English* coin, tho no proclamation of it extant.

But it may be of some use in case of newness of coin to produce the indentures, or the officers of the mint, or the stamps here used for the coin, and the like evidences of fact.

But as to forein coin legitimated here it seems necessary to shew the proclamation together with the proclamation-writ, or a remembrance thereof; and this is expressly required by the statutes of 5 & 18 *Eliz.* for impairing or clipping forein coin.

II. I come to the *second* consideration, what is a counterfeiting within this law.

And before I come to particulars it must be remembred, that the misfeasances concerning coin refer to two sorts of persons; *first* to such as are authorized either by their office or by charter or by custom to coin money, *monetarii*, moneyers, minters; or *secondly* those, who do counterfeit or take upon them the stamping of coin without such authority, counterfeiters, clippers, washers, &c.

Touching the former of these 3 *H. 7. 10. (b)*, *Si ipse, qui facit monetam in Angliâ autoritate regiâ infra turrim London vel alibi in Anglia vel Calicia, illam facit minus in pondere per dimidium ordinationis antiqui ponderis, &c. vel falso metallo, est proditio, & tamen ipsi, qui illam monetam utterant ligeis domini regis infra Angliam non sunt proditores nec proditio, sed mispriso.*

But it is not every mistake in weight or allay, that chargeth the moneyers with so high a crime as treason, for the master is chargeable by his indentures to a fine and ransom for some mistakes of this nature; but it must be a wilful gross proditorious doing it, for the indictment runs *proditorie*, and so it must be proved, for it is difficult for the best artist to make every piece of the precise weight.

Touching others that either counterfeit or imbase the coin.

First, There must be an actual counterfeiting, for a compassing, conspiracy or attempt to counterfeit is not treason within this statute without an actual counterfeiting.

But if many conspire to counterfeit, or counsel or abet it, and one of them doth the fact upon that counselling or conspiracy, it is treason in all, and they may be all indicted for counterfeiting generally within this statute, for in such case in treason all are principals.

How far a receiver is a principal, *videbimus infra Co. Pla. Cor.* 138. *Dyer* 296.

If *A.* counterfeits, and by agreement before that counterfeiting *B.* is to take off and vent the counterfeit money, *B.* is an aider and abetter to such counterfeiting, and consequently a principal traitor within this law; but if *B.* knowing that *A.* hath counterfeited money, put off this false money for him after the fact, without any such agreement precedent to the counterfeiting, he seems to be all one with a receiver of him, because he maintains him.

If *A.* counterfeit money, and *B.* knowing the money to be counterfeit vent the same for his own benefit, *B.* is neither guilty of treason nor misprision of treason, but it is only a cheat and misdemeanor in him punishable by fine and imprisonment.

But if *B.* know that *A.* counterfeited it, and doth neither receive, maintain or abet him, but conceals his knowledge, this is misprision of treason; and with this difference the book of 3 *H.* 7. above-cited is to be understood, and so it was ruled upon debate at the sessions at *Newgate Car.* 2. *ex libro Bridgman.* (c)

A. fashions stamps for the counterfeiting of money, but he is discovered and apprehended before he hath actually counterfeited it; this is no treason within this statute (d), for tho he hath counterfeited the stamps, yet he hath not counterfeited the money of *England.*

A. coun-

(c) *Aug.* 16 *Car.* 2. in the case of *Richard Oliver*, *Kel.* 33.

(d) 1 *Rich.* 3. 1. but is treason by the

statutes of 8 & 9 *W.* 3. *cap.* 25. and 7 *Ann.* *cap.* 25.

A. counterfeits the king's money, but never vents it; this is a counterfeiting, and treason within this statute, and so it hath been ruled *Co. P. C. p. 16.*

A. counterfeits the coin of this kingdom or any foreign coin of silver or gold of any foreign kingdom (*e*), and this counterfeiting is in another metal, as tin, lead, alchymy, copper gilt or silvered over, yet the former is treason within the statute of 25 *E. 3.* and the latter within the statute of 1 *Mar.* If there be a lawful coin of this kingdom, and *A.* doth counterfeit it in a considerable measure, but yet with some small variation in the inscription, effigies, or arms, to the intent thereby to evade the statute, yet this is a counterfeiting of the king's money, and that intent doth unquestionably appear, if he vent it as true: *vide supra de privato signetto. 16 Jac. (f)*

The clipping, washing or impairing, &c. of foreign coin made current by proclamation most certainly was not treason by the statute of 25 *E. 3.* but was made treason *de novo* by the statute of 5 & 18 *Eliz.*

But whether the clipping, washing or impairing the proper coin of this realm for lucre or gain were treasons within this statute of 25 *E. 3.* or not, is a question that deserves consideration, which, tho' it be now settled by those statutes to be treason, yet it is of moment to be known; if it were and continues treason by the act of 25 *E. 3.* then the judgment is only to be drawn and hanged; if it be a new made treason, then by my lord *Coke's* opinion the judgment must be to be hanged, beheaded, and quartered, as in treason for compassing the king's death. *Co. P. C. p. 17.*

I will therefore give the history of this business of washing, clipping, &c. *ab origine* from the time of the statute of 25 *E. 3.* for the history of former times at common law will be given in the next section.

It appears by the record of *M. 31 E. 3. coram rege rot. 18, 55. Bucks,* cited by *Co. P. C. p. 17.* within six years after the statute of 25 *E. 3.* that for counterfeiting and refection of the king's

(*e*) This must be supposed to be foreign coin current within the realm, for to counterfeit other coin is only mis-

prison by 14 *Eliz. prout patet supra.*

(*f*) *Robinson's case, 2 Rol. Rep. 50.*

king's coin *the abbot of Mussenden* was adjudged to be drawn and hanged, but not quartered.

By the statute of 3 *H. 5. cap. 6.* clipping, washing and filing of the money of the land is declared to be treason, and the offenders to be traytors, and shall incur the pain of treason; this was made to settle the doubt, and not purely as a new law.

The petition, upon which this act was made, is more full than the act, as it is printed, *Rot. Parl. 3 H. 5. part 2. n. 40.*

“ Item pryont les commons, qe come devant ces heures grand
 “ doubt & awerestee ad este, le quelle le tonsure, loture,
 “ filinge, & autre fauxisme de vostre monoy duissent estre
 “ adjudge treason ou nient, a cause qe null mention ent est
 “ fait en la declaration des articles de treason faits en le par-
 “ lement de vostre tresnoble besaiel lan de son raigne 25.
 “ Plese a vostre royal majestee de ordeiner, declarer, & deter-
 “ miner en cest present parlement par authority dicel, qe
 “ ceux, qe tondent, loient, filent, ou ascun autre fauxisme
 “ facent de vostre mony, soient adjudges traytors, & encur-
 “ gent la pain de treason, si bien come ceux qe apportent
 “ faux money en *Engleterre* sachant la estre faux, & qe cest
 “ declaration si bien soy extende al tiels tonsure, loture, &
 “ fauxisme faits avant ces heures come a faire en temps avener.
 “ Ro. Quant a le loture, tonsure & filinge soit il declare
 “ pur treason.

Nota, A retrospect desired, which was not usual, unless the law had held it treason before.

By the statute of 4 *H. 7. cap. 18.* counterfeiting or forging of forein coin current here is enacted to be treason, which before was neither felony nor treason.

By the statute of 1 *E. 6. cap. 12.* it is enacted, that there be no other treason nor petty treason, but what was ordained by the statute of 25 *E. 3.* or by that act; and after certain new treasons enacted there is a *proviso*, that this act extend not to repeal any act of parliament concerning the counterfeiting, forging, clipping, washing or filing any coin of this realm, or any coin of other realms made current here, or the bringing into the realm any counterfeit coin.

This proviso was absolutely necessary in relation to the treason in counterfeiting foreign coin contrary to the statute of 4 H. 7. cap. 18. because a new treason, but whether necessary in relation to clipping or impairing the coin of *England* declared to be treason by the statute of 3 H. 5. may be doubtful upon what herein after follows, but certainly was very fit and convenient to avoid the question.

By the statute of 1 Mar. cap. 1. it is enacted, that no offense being by act of parliament or statute made treason, petit treason, or misprision of treason, by words, writing, cyphering, deeds, or otherwise howsoever, shall be adjudged to be high treason, petit treason or misprision of treason, but only such as be declared and expressed to be treason, petit treason, or misprision of treason in or by the act of parliament of the twenty-fifth year of king *Edward III.* concerning treason, nor any pains, penalty or forfeiture to ensue upon any offender in treason, petit treason, or misprision of treason, than such as are ordained by that statute; and all offenses made felony or *præmunire* since 1 H. 8. not being felony or within the statutes of *præmunire* before, and all articles, &c. concerning the same are repealed.

And yet it appears by the statute of 1 & 2 Ph. & M. cap. 11. that then notwithstanding the statute of 1 Mar. cap. 1. they did take the impairing as well as forging or counterfeiting the king's coin to remain treason, for by that statute of 1 & 2 P. & M. cap. 11. that makes the importation of foreign counterfeit coin to be high treason it is provided, that any that shall be accused of the offenses contained in the same statute, or any other offense concerning the impairing, counterfeiting or forging of any coin current within this kingdom, shall be indicted, arraigned, tried, convicted and attaint by such like evidence, and in such manner and form as hath been used in *England* at any time before the first year of the reign of king *Edward VI.*

So that it seems they took impairing of any coin current to be a treason in force, but on the other side it may be said, so they took also the forging of any foreign coin current to be treason, when as yet the statute of 4 H. 7. concerning

forging of forein coin made current stood repeald by 1 E. 6. but it is plain that no such consequence could be made, for by the statute of 1 Mar. sess. 2. cap. 6. forging of forein coin made current here is enacted to be treason; so that as to the point of forein coin made current here, tho the statute of 4 H. 7. cap. 18. stood repeald, yet 1 Mar. cap. 6. stood in force at the time of the making of the statute of 1 & 2. P. & M. cap. 11.

Then ensues the statute of 5 Eliz. cap. 11. which reciting in exprefs words, that the statute of 3 H. 5. concerning clipping, &c. is repeald by 1 Mar. cap. 1. and the mischief that happens thereby enacts, “ That if after the first day of May
 “ next clipping, washing, rounding, or filing for wicked lucre
 “ or gain’s sake any of the proper monies or coins of this
 “ realm or the dominions thereof, or the monies or coins of
 “ any other realm allowd and sufferd to be current within
 “ this realm or the dominions thereof, or that hereafter at
 “ any time shall be lawful monies or coins of this realm or
 “ of the dominions thereof, or of any other realm, and by
 “ proclamation allowd and sufferd to be current here by the
 “ queen, her heirs or successors, shall be taken, deemed and
 “ adjudged by virtue of this act to be treason, and the of-
 “ fenders, their counsellors, consenters and aiders shall from
 “ and after the first day of May be deemed traytors, and suf-
 “ fer pain of death and forfeit their goods, and forfeit all
 “ their lands during their lives only.

“ That all, that by charter have lands or goods of tray-
 “ tors within their liberties, shall have these: a *proviso* that
 “ this act make no corruption of blood or loss of dower.

And the act of 18 Eliz. cap. 1. declaring that the falsifying, impairing, diminishing, scaling or lightning of money was not within the act of 5 Eliz. which ought to be taken strictly according to the words thereof, and the like offenses not by any equity to receive the like punishments or pains, enacts those offenses to be treason almost *in totidem verbis* with that of 5 Eliz. with the like *proviso*; and note this clause in both statutes, *and the offenders being lawfully thereof convict or attainted according to the due order and course of the laws of this realm shall suffer the pains of death.* These

These acts do in effect declare, that this was not treason within the statute of 25 E. 3. and that the statute of 1 Mar. cap. 1. repealed that declaration that was made in 3 H. 5. and gives the reason, because the law being penal ought to be taken and expounded strictly according to the words, and the like offenses not by any equity to receive the like punishment, and therefore lightning or scaling were not within the act of 5 Eliz. and neither within the act of 25 E. 3. against counterfeiting the coin.

And yet it is observable, that those very judges, which were present at the making of the statute of 5 Eliz. yet upon a solemn consideration in *Wright's case*, T. 6 Eliz. *Dyer* 230. did agree, that the judgment in treason *pro tonsurâ monetæ Angliæ* is no other but to be drawn and hanged, and accordingly judgment was given in that case; and upon search of the precedents at *Newgate* I find, that altho some judgments in case of clipping of money are *to be drawn, hanged, beheaded and quartered*; yet the greater number both of former and latter times have been only *to be drawn and hanged (g)* according to the judgment in 6 Eliz.

And therefore my lord *Coke*, *Pl. Cor.* p. 17. tho he agree, that the judgment for counterfeiting the coin of *England* is only to be hanged and drawn, as it was before the statute of 25 E. 3. seems nevertheless to be mistaken, when in the same page he saith, that if any be attainted for diminishing the king's money upon the statutes made in the time of queen *Mary* or queen *Elizabeth*, because it is high treason newly made, the offender shall have judgment as in case of high treason, *viz.* to be drawn, hanged, beheaded, dismembred, quartered, &c. for the greater number and better precedents run only to be drawn and hanged; and so it was lately ruled upon great consideration in a case in the king's bench (b), tho perchance it is not error, whether the one judgment or other be given.

Upon the whole matter therefore it seems to me, 1. That altho it should be admitted, that clipping of the coin of *Eng-land*

(g) *Morgan's case*, *Cro. Car.* 383. *man*, 1 *Ven.* 254. 2 *Lev.* 98. *Raym.*

(b) The case of *Bellew* and *Nor-* 234.

Und continued treason notwithstanding the statute of 1 *Mar.* that yet it is at this day treason merely by the statute of 5 *Eliz.* and therefore every indictment at this day for clipping or impairing, &c. must pursue the words of the statutes of 5 & 18 *Eliz.* and conclude *contra formam statuti*; and this not only in the case of clipping of foreign coin, which certainly was no treason after 1 *Mar.* and before 5 *Eliz.* but also in relation to the coin of *England*; and the reason is, 1. Because this statute hath added a qualification to these treasons of clipping or lightning, *viz.* it must be *for lucre's sake*, which must be expressly laid in the indictment, but need not have been so laid by the statute of 3 *H. 5.* for tho' perchance it was intended, yet it was not expressed in that statute, neither needed it then to have been in the indictment. 2. Because in express words the statutes of 5 & 18 *Eliz.* say, that it shall be treason by virtue of this statute, which is not a bare recital as in the beginning of the statute, that the statute of 3 *H. 5.* was repealed; but it is also an express enacting clause, which is in effect exclusive of any other law to make it treason, but this of 5 or 18 *Eliz.* for these words are in both the statutes. 3. Because it extremely alters the consequences of a judgment in treason, for here is no loss of dower, no loss of land but during life, no corruption of blood, so that these statutes did perfectly intend a total new establishment and qualification of this treason.

2. That altho' this be a new law, yet in as much as neither at common law nor after the statute of 25 *E. 3.* the treasons or offenses concerning money had any greater judgment, than such as is given in case of petit treason, namely for the man to be drawn and hanged, the woman to be burnt, no higher or other judgment is to be given upon the statutes of the 5th or 18th *Eliz.* and hence it is, that in the statute of 25 *E. 3.* tho' it rank counterfeiting money among high treasons, yet it alters not the judgment that was at common law, nay tho' it be most certain, that the statute of 25 *E. 3.* as to some points of bringing in foreign money be introductive of a new law, yet in as much as it concerns money, wherein the highest judgment at the time of 25 *E. 3.* was only that of

petit treason, it doth not inhanse the judgment higher; and accordingly it was resolved upon great advice and consideration of precedents *Car. 2. Banco Regis* in the case (i) for clipping *English* coin.

3. That upon any trial of counterfeiting, clipping, washing, &c. the coin of *England* or forein coin made current, there is no necessity either upon the trial or the indictment of two witnesses, required in other cases by the statutes of 1 E. 6. cap. 12. and 5 E. 6. cap. 11.

For as to the counterfeiting of money, or so much as was treason for impairing money, by 1 & 2 P. & M. cap. 11. it is expressly provided, that no other evidence shall be requisite either upon the indictment or trial than was before the statute of 1 E. 6. and as to clipping and washing the very statutes of 5 and 18 *Eliz.* in exprefs terms require only a conviction and attainder according to the order and course of the law; and therefore tho the statute of 5 E. 6. cap. 11. enact, that two witnesses or lawful accusers shall be required upon proceeding for any treason, that now be or hereafter shall be, yet that act is thus far derogated by those two acts, that require only an indictment, a conviction and attainder according to the order and course of the law generally; for tho it be held, that the statute of 1 & 2 P. & M. cap. 10. that enact, that all trials of treason shall be according to the course of the common law, doth not take away the necessity of two witnesses upon the indictment, because that is a distinct thing from the trial. 14 *Eliz.* lord *Lumley's* case, *Dy. 99. Co. P. C. p. 25.* yet the words (*conviction and attainder after the order and course of the law*) mentiond in the statutes of 5 and 18 *Eliz.* include the indictment as well as the trial, and therefore even without the aid of the statute of 1 & 2 P. & M. cap. 11. restores the whole proceeding according to the order of the common law in case of clipping or washing, as the statute of 1 & 2 Ph. & Mar. doth in exprefs words in case of counterfeiting.

And note, upon the statutes of 5 and 18 *Eliz.* tho *Irish* coin be not current in *England*, when of a baser alloy, yet it is

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(i) This I take to be the forecited case of *Bellew* and *Norman*, 1 *Ven.* 254.

the king's coin; and clipping or washing in *England* the coin of *Ireland* is treason by those acts, for the words are *the coin of this realm or dominions thereof*, which extends to *Ireland*.

4. The *fourth* thing observable upon these statutes is, that the act of 1 *Mar. cap. 1.* reducing all treasons to the standard of 25 *E. 3.* doth not only repeal treasons, that were newly enacted *de novo*, but such acts concerning treason as were only declarative, as this of 3 *H. 5.* among others.

IV. The *fourth* thing, that I propounded to consider, is the history of the punishment of counterfeiters, &c. of coin before the statute of 25 *E. 3.* and how it hath stood since.

In this kingdom and indeed in all kingdoms the counterfeiting of the king's money hath been in all ages *crimen lese majestatis* (k), tho in many of the old books (l) it comes under the general title of *crimen falsi*.

But the punishment in its kind and degree hath among us very much varied both in relation to the *monetarii* or moneyers, that were intrusted with the making of coin, and others, that took upon them to counterfeit the king's coin: among the laws of king *Athelstan*, l. 19. set down by *Brompton*, p. 843. *Una moneta sit in toto regni imperio, & nullus monetet extra portum, si monetarius reus fuerit, amputetur ei manus, & ponatur supra monetæ fabricam, accord Hoveden sub anno 1127. & M. Paris sub anno 1125. (m)*

In the time of *Henry I.* it is written by *Simon Dunelmensis*, p. 214. *Monetarii totius Angliæ principales deprehensi adulteros, scilicet non puros ex argento, fecisse denarios, jussu regis simul Wintoniæ congregati omnes unâ die amputatis dextris evirantur;*

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(k) By the old Roman law, *Qui nummos aureos, argenteos adulteraverit, laverit, conflaverit, rasarit, corruperit, vitiaverit, vultuve principum signatam monetam, præter adulterinam, reprobaverit, honestior in insulam deportandus, humilior aut in metallum damnandus, aut in crucem tollendus;* and whatever degree he was of, *ejus bona fisco vindicantur*: see *Ful. Pauli sententias receptas*, Lib. V. tit. 12. §. 12. and Lib. V. tit. 25. §. 1. Afterwards by a law of *Constantine*, *Cudendæ pecuniæ obnoxii ma-*

jestatis crimen committunt, & quicumque solidorum adulter poterit reperiri, flammarum exustionibus mancipetur, Lib. IX. Cod. tit. 24. l. 2. See also *Wilkin's Leges Anglo-Sax. p. 59. in notis.*

(l) *Bracton*, Lib. III. de corona, cap. 3. §. 1. *Glanvil*. Lib. XIV. cap. 7. *Flet.* Lib. I. cap. 22.

(m) *Leges Ethelstani*, l. 14. *Wilk. Leg. Anglo-Sax. p. 59.* See also *Leges Edgari*, l. 8. *Constitutiones Ethelredi in fine. Leges Cnuti*, l. 8.

tur; Et ibidem p. 231. Qui falsos denarios fecerit, oculos & inferiores partes corporis perdet; and Knighton, p. 2377. H. 1. statuit, ut fures suspenderentur, falsarii oculos & genitalia amitterent; & ut denarii & oboli essent rotundi. (n)

Knighton, p. 2463. "Edwardus primus tenuit parliamentum apud London, fecit mutari monetam regni, quæ illo tempore fuit viliter retonsa & abbreviata, unde populus regni graviter conquerebatur, & rex veritatem inquirens, & comperiens trecentos & plures de illo delicto & feloniam publicè convictos, quorum quidam fuerunt suspensi, quidam distracti & suspensi secundum delicti quantitatem & qualitatem, & ordinavit, quòd deinde Sterlingus & quadrans deinceps essent rotundi:" so that clipping was then held treason or at least felony.

After the statute of 25 E. 3. the punishment hath been constantly to be drawn and hanged, because that was the proper judgment of it before the making of the statute.

And altho the course hath been in treasons concerning the king's person not to allow the privilege of clergy, yet before 25 E. 3. cap. 4. *pro clero* it had been thought and practised in antient time to allow the privilege of clergy upon an indictment for counterfeiting money. (o)

But after that statute clergy was not allowable in case of counterfeiting money, 19 H. 6. 47. b. *Stamf. Pla. Cor.* i i 4. b. yet whereas in cases of treason regularly he that stands mute shall be thereby convicted, 15 E. 4. 33. a. *Stamf. Pla. Cor.* 150. a. because not within the statute of *Westmin.* 1. cap. 12. (p), yet we have some historical instances, that upon indictment of counterfeiting coin the prisoner standing mute was put to *pain fort & dure.* Knighton tempore R. 2. sub anno 1389. before
Belknap,

(n) *Wilk. Leg. Hen. 1.* p. 304. sub anno 1108. p. 308. sub anno 1125.

(o) For clergy was antiently denied only in such treasons, as were immediately against the king's person, and therefore *Co. P. C.* p. 16. clergy was allowed in the case of counterfeiting the great seal. See also the case of *Burdon*, (P. 18 E. 2. B. R. *Ror.* 25. *Rex. South'ton*) who was admitted to his clergy on being convicted

of felony and sedition in counterfeiting the great seal; but in *Thorpe's* case, (T. 21 E. 3. *Ror.* 23. *Rex.*) who was convicted of sedition in levying war, it was adjudged, that he could not be admitted to his clergy: *nota la diversite*; but the 26 H. 8. cap. 13. takes away clergy in all cases of treason: *vide antea in notis* p. 185 & 186.

(p) 2 *Co. Inst.* 177.

Belknap, Skipwith and others apud Lincoln septem falsarii monetæ conviçti, qui simul tracti fuerunt & suspensi, & quidam vicarius de Wintringham obmutescens adjudicatus est ad pœnam mutorum; but at this day the law is taken otherwise, and that standing mute amounts to a conviction of the crime.

And in short at this day in all cases of treason for counterfeiting the coin of this kingdom, or of any the dominions thereof, or of forein coin made current by proclamation, or for washing, clipping, scaling, impairing, or diminishing the same, tho most of these are made treason by new acts of parliament, as 1 *Mar. cap. 6.* 5 *Eliz. cap. 11.* 18 *Eliz. cap. 1.* yet the judgment is only for a man to be drawn and hanged, for a woman to be burned, and so, (as I said) it was solemnly resolved.

And the reason is, because tho most of these be new treasons made by act of parliament, yet they are all in their matter concerning money, wherein the judgment at common law was, as in case of petit treason; and that judgment was not altered by 25 *E. 3.* in case of counterfeiting, which is the highest offense concerning money, and therefore is not to be exceeded by the intent of those statutes, which brought lesser offenses concerning money, as clipping, into the same rank of offense with counterfeiting, for they are all offenses *in pari materiâ*, and so shall have a parity of judgment.

C H A P. XX.

Concerning treason in bringing in false money.

THE next point of treason is, if any man bring in false money into this realm counterfeit to the money of *England*, as the money called *Lushborough* or other like to the said money of *England*, knowing the money to be false, to merchandize or make payment in deceit of our lord the king and of his people.

Touching this point of treason these things are observable.

I. That the money in this case must be imported from a foreign nation, for here it is not the counterfeiting, that is the treason, but the importing; and yet it seems by the general words of the statute of 35 *H. 8. cap. 2.* the counterfeiting itself, tho' out of the kingdom, may be tried in the king's bench, or before special commissioners, as well as any other treason.

But at common law the counterfeiting beyond the sea seems not to have been such a treason as could be tried here; as treason in adhering to the king's enemies might have been; and therefore the importing was made treason by this act.

Altho' *Ireland* be within the statute of 35 *H. 8. cap. 2.* for trial of treason in compassing the king's death or levying of war, as is before observed, and therefore as to that purpose out of the realm of *England*, yet it hath been held upon the obscure book of 3 *H. 7. 10.* that an importation of counterfeit coin from thence into *England* is not treason here within that statute, principally because the counterfeiting itself is punishable by the statute of 25 *E. 3.* which is of force in *Ire-*

land. Co. P. C. p. 18. And the like reason holds for the *Isle of Man*; before this statute there was some difficulty what this crime should be.

In the time of king *Edward I.* there were three great inconveniences touching coin imported from foreign parts, sometimes they imported true coin of *England*, but such as was clipped, sometimes they imported counterfeit coin like to the coin of *England*, but of a base alloy; and most times they imported foreign coin, which yet passed between merchants, and filled the kingdom with bad money to the detriment of trade and the king's coinage.

And to remedy these inconveniences were those three ordinances made, called *Statutum de moneta magnum, de moneta parvum, & Articuli de moneta*, by which searches were ordained of all coin imported, that if any clipt money or any foreign money, other than of *England, Ireland* or *Scotland*, were taken, it should be pierced and redelivered to the owner, if it were false it should be detained, and the bodies of such as had false or clipt money to be attached (*a*), and if suspicious, detained till he produce his warrant; that money be received by weight: and by the second, *viz. Statutum de moneta parvum*, that if any merchant brought in clipt or counterfeit money, for the first offense he should lose the money, for the second he should lose his money and goods, and for the third *de corporibus suis & de omnibus bonis & catallis suis nobis totaliter incurratur*; that if they were not merchants, they should pierce the clipt and counterfeit money and send it to the exchange, otherwise in whose hands soever such money should be found, it should be forfeited to the king; and by *Articuli de moneta* the several faulty coins, foreign and others, that had obtained in the kingdom by common use are described and decried.

By the statute of 9 E. 3. cap. 2. *Item*, “That no false money or counterfeit *Sterling* be brought into this realm or elsewhere within our power upon forfeiture of such money.”

I

By

(a) See an ordinance to this purpose in the reign of king *John. Wilk. Leg. Anglo-Sax. p. 359.*

By an act or rather an advice, *Rot. Parl. 17 E. 3. n. 15. qe nul soit si hardy de porter fausse & malveis monoie en roialme sur peyn de forfeiture de vie & membre.*

Rot. Parl. 20 E. 3. n. 15. A complaint of importation of false money, especially the false money called *Luffheburnes*, praying *de punir ceux, qe sont trovez culpablez de l'apport, ou de le resceit de eux sachant le fauxisme, par judgment come faux monyers.*

Ro'. Quant a cest point de ceux, qe apportent la faux mony deins le realme, & qe le usent per voy de merchander ent sachaiant, le roy voet, quilz eient judgment de vie & de membre, come faux monyers, solonc les leys & customes de realme; but this was never drawn up into an act: yet *Rot. Parl. 21 E. 3. n. 19.* the commons desire the penalty may stand according as was ordained in the last parliament, and that it extend as well to the time past as to come, *& qe nul chartres de pardon soient grant de dit fauxime & treason:* they were answered, that the justices should be assigned to enquire of the time past and to come after this act, and to do right, and that pardons be not granted *cy legerment.*

By which it appears, that it was never settled to be treason till 20 E. 3. and even from that time there was but a faint proceeding upon that offense.

But this statute of 25 E. 3. was that, which made the final settlement in this point.

But this makes only the apporters themselves, their aiders, abettors, and assistants, traytors, not those, that receive it at the second hand; and this stands with reason and is consonant to the statute of *moneta* before cited, which rendred the merchants offense punishable at the third time with death, but subjected others only to loss of the money, if not pierced and carried to the exchange.

II. That it be counterfeit after the similitude of the money of *England*, otherwise it is not treason: the bringing in of money counterfeit after the similitude of forein coin made current here by proclamation is not treason within this act; but by the statute of 1 & 2 Ph. & Mar. cap. 11. it is enacted, "That if any person after *Jan. 20.* next shall bring from
" the

“ the parts beyond the sea into this realm or into any of the
 “ dominions of the same any false and counterfeit coin of
 “ money being current within this realm as aforesaid, (*viz.*
 “ by the sufferance and consent of the king and queen,)
 “ (*which extends to the successors*) knowing the same coin or
 “ money to be false and counterfeit, to the intent to utter
 “ or make payment of the same within this realm or any
 “ the dominions of the same, by merchandizing or other-
 “ wise, that every such offender, their counsellors, procu-
 “ rers, aiders and abettors shall be deemed traitors, and for-
 “ feit as in case of high treason.

And by the statute of 14 *Eliz. cap. 3.* forging of foreign coin not current by proclamation, as well without the realm as within, is made misprision of treason; but that act extends only to the counterfeiting, whether within the realm or without, but not to the bare importing; the instance that is here given is of *Lusboroughs*, which were a base counterfeit coin after the similitude of *English* coin.

Other monies both before and after this statute there were, some counterfeit, some clipt, some of baser metal, some foreign, which had their several courses and periods in this realm: *Pollards* and *Crokards*, that obtained some time in *Edward I.* but were after decried by proclamation 24 *E. 1. vide Dy. 81.* Other several base coins in the same king's time mentiond in the ordinance of *Articuli de monetâ, black money*, which had been formerly current here, recald by the statute of 9 *E. 3. de monetâ, cap. 4.* *Suskins, Dodkins*, and *Gally* half-pence recald by the statute of 11 *H. 4. cap. 5. 3 H. 5. cap. 1.* *Scotch* money recald by the statute of 3 *H. 5. cap. 1.* *Blankes* recald by the statute of 2 *H. 6. cap. 9.* and several penalties, some general, some of felony applied to them; but these were for the most part out of this statute, and obtained here by connivence, till recald.

III. The next qualification of this offense is, that the bringer in must know it.

IV. The next qualification is, that he must bring it to merchandize or make payment thereof in deceit of the king and his people.

Counterfeiting of the king's coin without uttering of it is treason; clipping, washing, &c. by the statutes of 5 and 18 *Eliz.* is treason, but it must be for gain or profit; and here the importing is not treason, unless it be to merchandize or utter it.

And hereupon my lord *Coke* (*b*) concludes, that he must merchandize therewith, or make payment thereof; it is a favourable exposition, but the statute is not, that if he import and merchandize, but *pur merchandizer & payment faire*, if it were to that intent, the statute makes it treason.

And by the statute of 1 & 2 *Ph. & Mar. cap. 11.* touching importation of coin counterfeit of forein money, it must be to the intent to utter and make payment of the same; and tho the best trial of an intention is by the act intended when it is done, yet the intent in this case may be tried and found by circumstances of fact, by words, letters, and a thousand evidences besides the bare doing of the fact.

As in case of those many acts, that prohibit lading of wool; gold, silver, &c. with an intent to transport the same, whereby some are made felony, &c. the intent shall be tried in those cases (being joined with an act) by circumstances, that evidence the intent of that action, for tho bare intentions cannot receive any trial, yet intentions joined with an overt-act, as here importation, may be tried and discovered by circumstances.

So that it seems the very importing of counterfeit money *pur merchandizer, &c.* to the intent to merchandize or make payment therewith, tho no such merchandize or payment be actually made, is treason by this statute, if the party importing know it to be such, and that as well his intent as his knowledge lies in averment and proof.

And thus far concerning treasons relating to money.

(a) *Co. P. C. p. 18.*

C H A P. XXI.

Concerning high treason in killing the chancellor, &c.

I Come shortly to treat of the last kind of high treason declared by this act.

Si home tuast chancellor, treasurer, ou justice nostre seigneur le roy del un banck ou del autre, justice in eyre, ou de assises, & tous autre justices assignes de oyer & terminer, esteant en leur place fessant leur office.

I. This statute extends only to the actual killing of some of these officers, and therefore a conspiring to kill any of these without actual killing of any of them is not treason; but if many conspire to do the act, and one of the conspirators actually do it, this seems to be treason in them all, that are abettors or counsellors to do the act, as is before instanced in levying of war, and therefore there is a particular act made 3 *H. 7. cap. 14.* that makes the conspiring the death of a privy counsellor to be felony. (*a*)

If a man only strike or wound one of these officers, tho in the execution of his office, this is a great misprision, for which in some cases the offender shall lose his hand (*b*), as was once done in the case of my lord chief justice *Richardson* sitting as justice of *oyer* and *terminer*, but it is not treason within this act.

2

II. This

(*a*) But this act extends only to such offenders, as are the king's sworn servants, whose names are entered in the cheque-roll of the king's household, and who is under the state of a lord; and according to lord *Coke's* opinion the conspiracy must be plotted to be done within the king's household. *Co. P. C. p. 39.* by this statute the offender was not deprived of the benefit of the clergy; but by 9 *Ann. cap. 16.* on occasion of *Robert*

Harley, Esq (afterwards earl of *Oxford*) being stabd by *Anthony Guiscard*, who was then under examination before a committee of privy council, it was enacted, "That whoever should unlawfully attempt to kill, or should unlawfully assault, strike or wound a privy councillor in the execution of his office, shall suffer death as a felon without benefit of clergy."

(*b*) 3 *Co. Inst. 140.*

II. This statute extends to no other officers but those above-named, and therefore not to the lord steward, constable, marshal, admiral, or lord of parliament, tho in the exercise of their offices; it may be murder, but not treason. *Co. P. C. p. 18.*

A justice of peace, tho there be in the end of his commission of the peace, *nec non ad diversa felonias, malefacta audiend' & terminand'*, is not a justice of *oyer* and *terminer* within this act, for the justices of *oyer* and *terminer* are intended such, as have their commission *ad audiend' & terminand', &c.* as the principal designation of their office; and thus it is in divers statutes also, that speak generally of justices of *oyer* and *terminer*. (c)

But a justice of peace may be also a justice of *oyer* and *terminer* by another commission, as many times they are, and then they are within this statute, when they are sitting by virtue of that commission.

The lord keeper, when there is a lord chancellor also, as there may be both at the same time, seems not to be within this law; but if there be no lord chancellor, then the lord keeper is within this act, for by the statute of 5 *Eliz. cap. 18.* their office is declared to be the same to all intents and purposes, as if the lord keeper were lord chancellor.

But the commissioners of the custody of the seal (d) or for the treasury are not lord chancellor or lord treasurer within this act, and therefore at such times as the treasury hath been in commission those commissioners have not the same power as the lord treasurer, as in cases of writs of error by the statute of 31 *E. 3. cap. 12.* (e) in the exchequer before the lord chancellor and treasurer, and so for the setting of the prices of wines by the statute of 7 *E. 6.* (f), neither do they fit as lord treasurer in the exchequer-chamber, as judges of equity.

It

(c) 9 *Co. 118. b. Cro. Eliz. 87, 697.*

(d) But it should seem, that now they are within the act, since by 1 *W. & M. sess. 1. cap. 21.* their office is declared to be the same, and they to have the same jurisdiction and privileges, as lord chancellor.

(e) See also 31 *Eliz. cap. 1.*

(f) This power is given by 37 *H. 8. cap. 23.* which statute was revived by the 5 & 6 *Ed. 6. cap. 17.* but there is nothing of it in the 7 *E. 6.*

It extends not to the chancellor and under treasurer of the exchequer, nor to the chancellor of the county palatine of *Lancaster*, nor to the lord privy seal, for these are special officers and of a lower rank, than the lord chancellor or treasurer.

III. The *third* qualification of this treason is, that it must be *esteants en lour places, fesant lour offices*; wherever the seal is open, whether in the court of chancery or in the chancellor's house, the chancellor or keeper there sealing writs is *seant en son place, fesant son office*.

And the same law seems to be, if he be hearing of causes in his chamber, for tho' antiently the hearing of causes upon *English* bills was rare, yet use hath sufficiently obtained to give it the style of *seant son office*.

Quere, touching the lord treasurer's dispatching business in his house, whether this be *seant in son place*, but sitting in the court of exchequer, or exchequer-chamber, or in the star-chamber, when it stood, had been *seant in son place, &c.*

The place for the justices of the several courts are the courts themselves, where they usually or by adjournment sit for the dispatch of the business of their courts.

And so much shall suffice for this treason also.

C H A P. XXII.

Concerning principals and accessaries in treason.

BEfore I leave the discourse concerning high treason it is necessary to consider, whether or how all are principals in high treason.

In cases of felony there are two sorts of principals, *viz.* principals in the first degree, that do the fact, be it in murder or any other felony, and principals in the second degree, that are present aiding and abetting the felony.

And regularly in felony there are two sorts of accessaries, 1. Accessaries before the fact, which are not present, but yet counselling, commanding, or abetting the felony, but in manslaughter no such accessaries can be before: and 2. Accessaries after, such as knowing a felony to be done by such a man do yet receive or maintain him, unless it be a wife receiving her husband (*a*); of this hereafter in its due place.

Now in treason thus far it is agreed of all hands, 1. That there are no accessaries *à parte ante*, but all such as counsel, conspire, aid, or abet the committing of any treason, whether present or absent, are all principals. 2. It is likewise agreed of all hands, that in all treasons, except that which concerns counterfeiting the great or privy seal, or money, whosoever knowingly receives, maintains, or comforts a traitor, is a principal in high treason. *Co. P. C.* 16, 138. and so it is there cited to be resolved in the case of *Abington*, who received *Garnet*, that was one of the conspirators in the powder treason: that which hath occasioned the doubt hath been the resolution in *Conyer's* case, *Dy.* 296. who was indicted, that *proditorie receptasset, &c.* *Fairfax, sciens ipsum diversas pecias monete ad similitudinem monete Angliæ vocat' shillings*

O o o

(a) *Vide supra p. 47.*

lings *de falso metallo fabricasse*; upon this he and others were discharged, because it was imprisonment of treason only, and not treason; but this opinion is contradicted by my lord Coke, *Pla. Cor. p. 138.* and yet it is said by the same author, *Pasche 9 Jac. 12 Rep. 21.* the receiver of a counterfeiter of the seal or money is no traitor.

We will see therefore in what cases an act *ex post facto* will be treason in relation to the aid of him, that committeth this or any other treason.

A man is imprisoned for treason, the gaoler voluntarily suffers him to escape, this is treason in the gaoler. *Stamf. Pl. Co. 32.*

If a person be arrested for treason, he that rescues him is guilty of treason.

And so if a man be imprisoned for treason, and another prisoner or any other person breaks the prison, and lets out the party imprisoned for treason, this is treason in the party that breaks the prison. *1 H. 6. 5. Stamf. Pl. Cor. 32.* nay, if a stranger breaks the prison, and lets out one there imprisoned for treason, this is held treason, tho he that breaks the prison knew not that any there was imprisoned for treason; so resolved by ten judges, *P. 16 Car. Croke 583. Bensted's case*; but my lord Coke holds, that he must be knowing it. *Co. Mag. Cart. super statutum de frangentibus prisonam. (b)*

Rot. Parl. 2 H. 6. n. 18. in schedula. Mortimer was committed to the Tower of London for suspicion of treason; and *23 Feb. 2 H. 6.* was indicted, *quod per covinam, confederationem & assensum Willielmi King, &c. pro diversis denariorum summis eidem Willielmo King per præfatum Johannem Mortimer promissis, idem Johannes turrim prædictæ falso & proditoriè fregit*: the indictment was removed into parliament, and John Mortimer likewise brought into the parliament: the commons desired the duke of Gloucester (then commissioned to hold the parliament) that the indictment might be affirmed, and that *John Mortimer de prædictis prodicionibus & felonis convincatur*: thereupon the duke and lords at the request of the commons affirm the indictment

ment by act of parliament, & quòd prædictus Johannes Mortimer de proditionibus & felonis prædictis convincatur, & quòd trabatur per medium civitatis, & super furcas de Tyburne suspendatur, & ad terram projiciatur, & cuput ejus amputetur, & interiora sua comburantur, & corpus ejus in quatuor partes dividatur, & caput ejus ponatur super portam pontis London, &c. & quòd bona & catalla, terras & tenementa sua, tam in domino, quàm in reversione, domino regi forisfaciat.

So that it seems, tho the statute of 25 E. 3. speak not of these offenses, yet they are in a Manner incidents, and virtually included within the original offense, and therefore these cases of voluntary permission to escape, rescue, breach of prison, translate the original offense upon him, that commits it by the common law; and these would be treasons as well in the case of counterfeiting of coin, as other treasons.

But herein these things are observable, 1. This judgment in *Mortimer's* case is not at all now in force, nor binding, for the statute of 1 *Marie* repeals not only enacted treasons, but declared treasons, that were not within 25 E. 3. and 2. That therefore at this Day, if one be committed for suspicion of treason, and another break gaol to let him out, yet unless the party imprisoned were really a traitor, this is no treason at this day. 3. But if he were really a traitor, then breaking of the prison to enlarge him is treason, and a treason of a greater guilt, than a knowing receiver, and then it is treason by virtue of the common law, for it is a kind of incident; the like of a receiver of a traitor, or a gaoler that suffers him voluntarily to escape, those are incident treasons by the common law, and virtually included in the statute of 25 E. 3. as well as a receiver of a traitor knowingly.

The differences therefore seem to be these, which state and reconcile the whole matter.

First as for new treasons. If an act of parliament enact a new treason, and that the offender, his counsellors, abettors, and aiders thereunto shall suffer as traitors, this doth not make receivers or comforters after the fact guilty of treason, for *expressum facit cessare tacitum*; such a clause we shall find

find in the statute 23 *Eliz. cap. 2.* for a new felony (c),
5 *Eliz. cap. 1.* in case of a *præmunire.* (d)

If an offense be made treason in the offender, his procurers, counsellors, abettors, consenters, (without the word *thereunto,*) yet it seems to me for the same reason it doth not make the knowing receivers traitors, unless the words *receivers* or *comforters* be also inserted: for the former words import an offense preceding or concomitant to the act of treason, but the latter words *receivers* and *comforters* are after the offense, and so of another nature: and this difference appears expressly by the statute of 13 *Eliz. cap. 2.* where *abettors, procurers,* and *counsellors* are made guilty of high treason; but *receivers* and *comforters* (e) after the fact are only within the statute of *præmunire*; the like in 27 *Eliz. cap. 2.* where the coming of a priest, &c. is *treason*, but his receiver, aider or comforter is *felony*: so 5 & 6 *E. 6. cap. 11.* and 1 *Eliz. cap. 5.* *the offenders, their counsellors, abettors and procurers, and all and every their aiders and comforters knowing the same* extend to knowing receivers.

The word (*aid*) is of somewhat a more doubtful extent, yet we shall find in those statutes and some others the word *aid* to be applied to an aiding after the offense, and not in it or to it; but it seems to me, that when it is joined only with those that import a consent to the offense, (as *procurers, counsellors, aiders, abettors, or counsellors, consenters and aiders,*) as in the statute of 5 *Eliz. cap. 11.* for clipping, 18 *Eliz. cap. 1.* for impairing, 1 *Mar. sess. 2. cap. 6.* for counterfeiting forein coin, it must be construed of those that are *aiders* in the offense, and not bare receivers of the person.

But in all new treasons, those that rescue him from prison or suffer him voluntarily to escape being lawfully committed to his custody, tho these are not expressly containd in that new act of treason, yet they are traitors by a necessary construction of law upon the act itself; but if the act be general,
making

(c) The words of this statute are, *counsellors, aiders, assistants and comforters, procurers, and abettors.*

(d) The words of this statute are more extensive, *viz. abettors, procurers,*

(e) The words in this place of the statute are, *aiders, comforters or maintainers.*

making a man a traitor for such an act without mentioning in what degree his aiders, or abettors, comforters, or receivers shall be; it seems probable, that the receiver, knowing it, is thereby virtually made also a traitor; this, I say, seems probable, but most certainly procurers, consenters, and aiders to the fact are thereby traitors, tho not specially so enacted; this is agreed in *Conyer's case*; *Dy.* 296. *Co. P. C.* 16 & 138.

Secondly, As touching treasons within the act of 25 E. 3.

The procuring, counselling; consenting; or abetting such treasons, tho not specially expressed in that statute, is treason within that statute. *Co. P. C. cap.* 64. *p.* 138. and so is the receiving of a traitor, or a gaoler's voluntary permitting him to escape, if he were in truth a traitor.

In case of the knowingly receiving of a person guilty of counterfeiting of coin, or of the great seal, there is diversity of opinion; *M.* 12 & 13 *Eliz.* *Dy.* 296. and my lord *Coke* himself in his 12 *Rep.* *p.* 21. 9 *Fac.* says, that it is not treason, and yet *Pli. Cor. cap.* 64. *p.* 138. he holds it treason, tho this latter opinion is the more probable; the former is more merciful.

But in all other treasons against the king within the statute of 25 E. 3. the receiver of a traitor knowingly makes the receiver a traitor: this was *Abington's case* for receiving *Garnet* guilty of the powder treason. *Co. P. C.* *p.* 138.

Only this difference is to be observed, he, that being committed for treason breaks prison, may be indicted for breaking of prison before he be convicted of the principal offense, for which he was committed, but not of treason, but it will be only felony by the statute *de frangentibus prisonam*, for this statute *de frangentibus prisonam* makes it not treason; and if it did, yet the statute of 25 E. 3. makes it no treason, because not within the same statute; and consequently 1 *Mar. cap.* 1. exempts it from being treason; but he, that rescueth a person imprisoned for treason, or suffers him voluntarily to escape, shall not be arraigned for that offense, till the principal offender be convicted of that offense; for if he be acquitted of the principal offense, the gaoler that suffered the escape,

and he that made the rescue shall be discharged; and the like in felony. *Coke Mag. Car. super stat. de frangentibus prisonam* p. 592. and the reason is, because tho rescuing a person charged with treason, or suffering him wilfully to escape be a great misdemeanor, yet it is not treason, unless in truth and reality he were a traitor, for a man may be arrested or imprisoned under a charge of treason, and yet be no traitor.

And tho the receiver of a traitor, knowing it, be a principal traitor, and shall not be said an accessary, yet thus much he partakes of an accessary, 1. That his indictment must be special of the receipt, and not generally, that he did the thing, which may be otherwise in case of one, that is a procurer, counsellor, or consentor; thus it was done in *Conyer's case*, *Dy.* 296. 2. That if he be indicted by a several indictment, he shall not be tried till the principal be convicted (*f*), upon the reason of the gaoler and rescuer before given, for the principal may be acquitted, and then he is discharged of the crime of receipt of him. 3. If he be indicted specially of the receipt in the same indictment with the principal offender, as he may be, yet the jury must first be charged to inquire of the principal offender; and if they find him guilty, then to inquire of the receipt, and if the principal be not guilty, then to acquit both; and accordingly it was ruled in *Arden's case*. (*g*)

For tho in law they be both principals in treason, and possibly process of utlary may go against him, that receives, at the same time as against him, that did the fact; and tho the principal appear, process may go on against the other (otherwise in the case of an accessary in felony, *Stamf. Pla. Cor.* 47.) yet in truth he is thus far an accessary, that he cannot be guilty, if the principal be innocent.

How far *Mortimer's case* agrees with law at this day, *videbimus infra*, & *vide supra*.

3

That

(*f*) See *postea* Book II. cap. 28. And therefore the conviction of lady *Alice Lisle*, 1 *Jac.* II. was contrary both to law and reason, for that *Hicks* the principal (for harbouring whom she was convicted of

treason) was not at that time convicted, nor indeed was there any proof, that she at that time knew he had been in the rebellion. *State Tr.* Vol. IV. p. 105.

(*g*) 1 *And. n.* 154. p. 109.

That, which will not make an accessory to felony after the fact, will not make a man principal in treason; therefore sending of a letter for his deliverance, or speaking a good word for him, &c. will not be treason. *Stamf. Pl. Cor.* 41. b. how far charitable relief will do it, *vide infra super statutum* 13 *Eliz. cap.* 1.

C H A P. XXIII.

Concerning forfeitures by treason.

HAVING gone thro the several treasons declared by this statute, I shall now proceed to what follows in this statute, which is; 1. Touching forfeitures of high treason. 2. Touching declaring of treason by parliament, and under this head shall consider those several declarations and new enacted treasons since the statute of 25 E. 3. and how they stand at this day.

The forfeitures for treason are either goods or lands.

As to goods: the king's prerogative as to goods forfeit for treason is the same as to forfeitures for felony, only there seems to be some difference in relation to grants thereof. 22 *Ass.* 49. The king grants to the master of St. *Léonard's Omnia bona & catalla tenentium suorum fugitivorum, & felonium qualitercunque damnatorum.* A tenant of the master's was convicted and attaint for killing of the king's messenger, which at that time was held high treason; it was ruled, that the master shall not have the goods of this person by force of this general grant.

As to lands this statute of 25 E. 3. goes farther, *Et soit a entendus, qe les cases suisnosmes doit estre adjudge treason, qe se extend a nostre seigneur le roy & sa royal majesty, & de tiel manners de treasons le forfeiture des eschetes appertenont a nostre seigneur le roy, ci bien de terres & tenements tenus des autres, come de lui mesme.* I shall

I shall here examine, 1. Of what lands the king shall have the eschete upon attainder of treason, and 2. In what manner or degree he shall have those eschetes. 3. Where a subject in point of privilege or franchise shall have these royal eschetes.

I. As to the first of these, what lands are forfeit to the king by attainder of treason, my lord *Coke*, *Pl. Cor. p. 19.* gives a full account of them, which I shall repeat with some additional observations: 1. At common law the lands entailed were forfeited for treason, because it was a fee-simple conditional; but by the statute *W. 2. de donis conditionalibus* the forfeiture of lands entailed, even in case of treason, was taken away, and the general words of this statute of 25 E. 3. doth not repeal the statute of *Westm. 2.*

But some later statutes have given to the king the forfeiture for treason of lands entailed: the statute of 21 R. 2. *cap. 3.* did give the forfeiture of lands entailed to the king for the treasons therein mentiond; but that statute with the whole parliament of 21 R. 2. was repeald by the statute of 1 H. 4. *cap. 3.*

By the statute of 26 H. 8. *cap. 13. in fine* lands entailed are forfeited by attainder of treason, *viz.* “ All such lands, tenements and hereditaments, which any such offender shall have of any estate of inheritance in use or possession, by any right, title or means, within any of the king’s dominions at the time of any such treason committed, or at any time after, saving to all persons, other than the offenders, their heirs and successors, and such persons as claim to any of their uses, all such right, title, interest, possession, &c. as they might have had if this act had not been made.

And by the statute of 33 H. 8. *cap. 20. (a)*, “ That if any person be attaint of high treason by the course of the common law such attainder shall be of as good force, as if it had been by parliament; and the king, his heirs and successors shall have as much benefit by such attainder, as well of uses, rights, entries, conditions, as possessions, reversions, remainders and all other things, and shall be deemed

3

(a) See the cause of making this act, 3 *Co. Rep. 10. b.*

“ deemed in the actual and real possession of the lands, tene-
“ ments, hereditaments, uses, goods, chattles; and all other
“ things of the offender, which his highness ought to have,
“ if the attainder had been by authority of parliament, with-
“ out any office or inquisition to be found for the same, sav-
“ ing to all persons, (other than the offenders and their
“ heirs and assigns, and other persons claiming by, from or un-
“ der them or to their uses after the treason committed) all
“ such right, title, use, possession, entry, reversion, remainder,
“ interest, condition, fees, offices, rents, annuities, commons,
“ leases, and all other commodities, and hereditaments what-
“ soever, which they should, might, or ought to have, if
“ this act had not been made.

And the statute of 5 & 6 Ed. 6. cap. 11. is to the same effect.

These statutes as to the forfeiture of lands entaild remain in force, and are not repeald by the statute of 1 Mar. and so it hath been often ruled, and particularly by all the judges in the lord *Sheffield's* case 21 Jac. *de quo postea*.

And the reason is, because the statute of 1 Mar. cap. 1. enacting; that no treason shall be but what was enacted by 25 E. 3. and that no pains of death, penalties or forfeitures shall ensue for doing any treason, other than be in the statute of 25 E. 3. these words *other than be mentiond in the statute of 25 E. 3.* refer to treasons, not to forfeitures or penalties; and therefore tho by the statutes of 26 and 33 H. 8. new penalties, *viz.* forfeitures of lands intaild, are introduced, this forfeiture is not repeald, but only new treasons not mentiond in 25 E. 3. so that at this day, if tenant in tail be attaint of treason, the estate-tail is forfeited, and yet this attainder works no corruption of blood as in relation to the heir in tail: *vide* the lord *Lumley's* case cited in *Downtie's* case, 3 Co. Rep. 10. b. Grandfather, tenant in tail, father, and son, the father is attaint of treason and dies, the grandfather dies, the land shall descend to the grandchild, for the father could forfeit nothing, for he had nothing to forfeit; and the statute of 26 H. 8. that gives the forfeiture of tenant in tail, yet corrupts not the blood by the attainder of the father.

And therefore it is agreed in the principal case; that if after 26 *H. 8.* and before 33 *H. 8.* which vests all in the king without office, if tenant in tail had been attainted of treason, and died in that interval, the land would have descended to his son till office found; but otherwise in case of tenant in fee-simple attainted and dying before office, the freehold is cast upon the king without office, because none could take it else.

2. The king at common law and by virtue of this statute was entitled to a right of entry, where the party was in merely by disseisin or abatement, but not to a right of entry, where the possessor was in by title; but at this day by virtue of the statute of 33 *H. 8.* above-mentioned the king is entitled to a right of entry in both cases, and that without office, but then there must be an inquisition or seizure to bring the king into the actual possession; and if he grant it over before such seizure, the grant must be special, not of the land simply, but of the right to the land, otherwise neither land nor the right of entry passeth; it is so adjudged in *Dowty's* case, 3 *Co. Rep.* 10. *b.*

3. If a person committing treason hath at the time of the treason committed a bare right of action touching any lands, or a right to reverse a judgment given against him by writ of error, or a right to bring a formedon, or writ of entry, but hath no right of entry without such recovery in such action; this right neither at common law nor by the statute of 33 *H. 8.* is given to the king by the attainder of treason, 3 *Co. Rep.* 3. *a.* marquis of *Winchester's* case, 3 *Co. Rep.* 10. *b.* *Dowty's* case so adjudged; but yet there have been two great cases resolved, that tread hard upon the heels of this judgment.

H. 15 Eliz. Pl. Com. 552. *b.* *Walsingham's* case: *Wyat* tenant in tail of the gift of king *Henry VII.* the reversion in the crown, made a feoffment in fee, and then was attaint of treason, and died leaving issue, tho the feoffor against his own feoffment could not claim any right at the time of the treason; yet it was adjudged, 1. That there remained in him such a right of the entail, as was forfeited to the king. 2. And

that the king was in as of his reversion, and should not be subject to leases duly made by *Wyat* before his attainder.

21 *Fac. in Camera Scaccarii* *Stone* and *Newman's* case, it was adjudged in *B. R.* and affirmed in *Camera Scaccarii* by the greater number of justices. *Bigott* tenant in tail general makes a feoffment to the use of himself and his heirs; and before the statute of 26 or 27 *H. 8.* commits treason, and is attaint of treason, and dies leaving issue inheritable to the entail, then a special statute is made 31 *H. 8.* whereby he was to forfeit all estates and rights; yet it was adjudged, 1. That against his own feoffment the tenant in tail could have no right, and therefore if the case had stood barely so, the right of the entail could not have been forfeited by the attainder. 2. But when an estate returns to him, that is forfeited by the attainder, the king shall hold this estate discharged of the right of the old entail, and that right shall never revive to the issue. 3. That the retrospect of the king's title by the attainder shall over-reach and avoid the remitter, which was wrought in the issue before the king's actual seisin by the attainder or office thereupon.

But it is to be noted, that if the king makes a gift in tail, saving the reversion to himself, the attainder of treason of such tenant in tail shall not bar his issue, because the statute of 34 *H. 8. cap. 20.* enacts, "That the heir in tail in such case shall have the lands, any recovery, or any other thing or things hereafter to be had, done or suffered by or against such tenant in tail to the contrary notwithstanding"; which act coming after 26 *H. 8.* and 33 *H. 8.* that gave the forfeiture of lands entailed, is a repeal of those statutes as to this case, and a restitution of the statute *de donis conditionalibus* in this special case: and therefore, where in *Plowden's Commentaries* (*Walsingham's* case) *Wyat*, who was tenant in tail of the gift of the crown, the reversion in the crown, was attaint of treason 1 *Mar.* he had not forfeited his land by virtue of the statutes of 26 or 33 *H. 8.* if there had been no more in the case; but in that case he lost it, because by a special act of 1 & 2 *Ph. & Mar.* that attainder was confirmed, and farther it was enacted, "That he should forfeit all the
" lands

“ lands, tenements and hereditaments, whereof he or any to
 “ his use was seized the day of the treason committed, fa-
 “ ving the right of all persons other than the person at-
 “ tainted and his heirs, and all claiming under them after
 “ the treason committed;” and this act coming after 34
H. 8. cap. 20. repealed that act as to this case, as the act of
 34 *H. 8.* repealed the acts of 26 and 33 *H. 8.* as to entails of
 the gift of the crown, where the reversion continues in the
 crown.

But since all these statutes it is enacted by the statute of
 5 & 6 *Ed. 6. cap. 11.* “ That every offender being lawfully
 “ convict of any manner of high treason according to the
 “ course and custom of the common law shall lose and for-
 “ feited to the king’s highness, his heirs and successors, all
 “ such lands, tenements and hereditaments, which any such
 “ offender or offenders shall have of any estate of inheritance
 “ in his own right, in use, or possession, within this realm
 “ of *England*, or elsewhere within the king’s dominions at
 “ the time of such treason committed, or at any time after:”
 this act coming after 34 *H. 8.* makes lands of the gift of the
 king in tail subject to forfeiture for treasons, as well as other
 lands entail. 16 *Eliz. Dy. 332. b.*

4. At common law the king was not entitled to a condi-
 tion, that was in the party attainted; but now by the ex-
 press words of the statute of 33 *H. 8.* the king is in some
 cases entitled to a condition of re-entry belonging to the party
 attainted, *viz.* not to the land itself but to the benefit of that
 condition, which might reduce the land into the possession of
 the party attainted, if he had not been attainted, and now
 to the benefit of the king: but herein this difference is to be
 observed.

1. If the condition be such, as that the substance of the
 performance thereof is not bound up strictly to the person at-
 taint, then such a condition is given to the crown, and he
 may perform it, as the party himself might have done in
 case the condition hath a continuance.

7 *Co. Rep. 11. b. Englefeild’s case:* Sir *Francis Englefeild* con-
 veyed his lands to the use of himself for life, the remainder

to his nephew and the heirs male of his body, &c. with a proviso, that in as much as he might turn prodigal, and therefore for a bridle to him, if Sir *Francis* by himself, or any other during his life, should deliver or offer to his nephew a ring of gold to the intent to make void the uses, then the uses should cease: Sir *Francis* is attaint of treason; it was ruled, that the queen in the life-time of Sir *Francis* may by commission, &c. tender the ring and make void the uses, for it was not personally annexed to him, but might be performed by the queen.

This case was judged *M. 33 & 34 Eliz.* but it was not thought safe to rely upon this judgment; but *35 Eliz. cap. 5.* there was a special act of parliament reciting the attainder and the conveyance with the proviso: "And it is declared and enacted, that the attainder be confirmed, and that the queen was lawfully entitled to take benefit and advantage of that proviso in the same form, as Sir *Francis Englefeild* might have done, and that the said proviso or condition was well performed by the queen's commission:" But suppose Sir *Francis* had died before the queen had made the tender, then the condition, which was only limited to him during his life had been determined, and the queen could not have tendered, for the attainder could not lengthen the condition longer than the first limitation; but on the other side, if the condition be appropriated and applied to the person of the party attaint, then such condition is not given to the crown.

The duke of *Norfolk's* case *11 Eliz. (b)* cited in *Englefeild's* case to be adjudged and then agreed by the court: the duke conveyed land to uses, provided that if he shall be minded to revoke, and shall signify his mind in writing under his proper hand and seal subscribed by three witnesses, that then the uses should be revoked; it was ruled, that this condition was not given to the crown by his attainder.

2 Car. 1. B. R. Sir William Shelly (c) made a feoffment to the use of himself for life, the remainder to his first, second,
R r r
third,

(b) 7 Co. 13. a.

(c) See this case by the name of *Warner and Hardwin* in *Latch* 25, 69, 102. *W. Jones* 134.

third, and other sons in tail, provided, that if Sir *William Shelly* at any time during his life give or deliver, or lawfully tender to the feoffees or any of them, their heirs or assigns, a gold ring, or a pair of gloves of the price of twelve-pence, *ipso Willielmo tunc declarante & expressante*, that the tender was to the intent to avoid the deed, that then it should be void, and the feoffees should stand seised to the use of Sir *William* and his heirs; and it was adjudged in the common pleas, that this condition was so personal, that it was not given to the king, but upon a writ of error in *B. R.* the court was divided; *Whitlock* and *Jones*, that it was given, *Croke* and *Doderidge*, that it was not given to the king, & sic stetit.

In the case of *Wheeler* and *Smith* (*d*), *Simon Mayne* being possessed of the rectory of *Haddenham* for sixty years, in 1643. assigned it over to trustees in trust for himself for life, and afterwards to divers other trusts for payment of debts and other things, provided nevertheless and upon condition, that if the said *Simon Mayne* shall at the time of his decease have issue of his body, that then and from thenceforth the trustees shall stand possessed for such person and persons, and such estate and estates, as *Simon Mayne* by his last will and testament shall limit and appoint, and for want of such limitation and appointment, in trust for such after-born child; provided also, that if the said *Simon Mayne* shall hereafter during his life be minded to make void these present indentures, or any use or trust therein, or to limit new uses, and the same his mind shall declare or signify *under his hand and seal* in the presence of two witnesses, then the uses shall cease, and then the trustees shall stand possessed to such uses, as he by such deed or writing, or by his last will and testament in writing shall limit and appoint. *Simon Mayne* was guilty of the execrable murder of the king, had issue a son, was attainted, and died without making any such will or revocation or declaration, and by act of parliament all the estates, which he had or any in trust for him, and all rights, conditions, &c. were vested in the crown, who granted this rectory to the duke of *York*, and by him the same was granted

(*d*) See this case reported 2 *Keb.* 564, 608, 644, 763, 772. 1 *Msd.* 16, 38.

to Sir *William Smyth*: it was adjudged in the common pleas, and upon a writ of error affirmed in the king's bench, *P. 23 Car. 2.* that Sir *William Smyth* had no title to this rectory:

1. That this was a personal condition and not given to the king, *under his hand and under his proper hand*, being all one in sense and appropriate to his person.
2. That, if it were given, yet the same expiring by the death of *Mayne* could not be performed after his death by the king.
3. Admitting it might, yet nothing but the condition was in the king, and not the rectory itself, till the condition performed.
4. That consequently the rectory passed not to the duke of *York*, because the condition was not performed.
5. Neither the performance of the condition nor the benefit thereof passed to the duke by the general grant of the rectory, but it must have been specially granted, or otherwise nothing passed.
6. That here was no estate in trust for *Simon Mayne* longer than during his life, because the whole residue of the trust was out of him, and was not reducible back to him, but by a strict performance of the condition or power, which was strictly tied to the person of *Simon Mayne*, and determined by his death, and therefore not given to the crown; but if it had been given to the crown, and might by the crown be transferred to the patentee, yet it seems the patentee could not transfer or assign that condition over to another; but this last question was not moved, as I remember, for the resolution of the former points made an end of the case.

5. At common law the king by attainder of treason was not entitled to uses or trusts belonging to the party attaint: thus it is recited to be the law by the statute of *27 H. 8. cap. 10.* and was one of the reasons of the making of that statute for transferring of uses into possession; and hence it was, that in some general acts touching treason, as that of *21 R. 2. cap. 3.* and in most particular acts of attainder, that were made after that time, there was special provision made, that the parties attaint should forfeit all the lands, whereof they or any other to their use were seized, and in most of those acts provision was also made to save from forfeiture such lands, whereof the persons attaint were seized to the use of
any

any other, as may be seen in the acts of attainder: *vide Rot. Parl.* 1 E. 4. n. 18. 3 E. 4. n. 28, &c.

And yet, altho the statute of 27 H. 8. cap. 10. had executed uses into possession, so that after that statute all uses were drowned in the land, yet there have succeeded certain equitable interests called trusts, which differ not in substance from uses; nay, by the very statute of 27 H. 8. cap. 10. they come under the same name, *viz. uses or trusts.*

And by the statute of 33 H. 8. cap. 20. there is a special clause, that the person attainted shall forfeit all uses, &c. and the saving is to all persons other than the person attainted, and his heirs, and all persons claiming to the use of them or any of them.

And what other uses there could be at the making of the statute of 33 H. 8. but only trusts, such as are now in practice and retained in chancery, I know not, and yet such hath been the opinion of men, or rather their necessity in respect of frequent emergencies in estates and their dispositions thereof, that these trusts since the statute have not only been kept from being executed by the statute of 27 H. 8. but have been held and used quite as other things different from uses, and from all those burdens, with which uses were incumbered by several acts of parliament made before 27 H. 8.

And therefore *H. 35 Eliz. Croke, n. 2. B. R. Ridler and Punter (e)*, such a trust not within the statute of 3 H. 7. cap. 4. or any other statute of that nature.

M. 16 Jac. B. R. Croke, n. 23. (f) the king made a lease for years to Sir *John Duncombe* of the provision of wines for the king, but in trust for the earl of *Somerset*, who was afterwards attainted of felony; by the opinion of all the judges the king shall have this trust, and so if a person outlawed have a bond made to another in trust for him, it shall be executed by an information in the exchequer-chamber or chancery; but it was agreed by them all, and so resolved in *Abington's* case, that a trust, if a freehold, was not forfeited by attainder of treason.

But how this resolution in *Abington's* case can stand with the statute of 33 *H. 8.* I see not, for certainly the uses there mentioned could then be no other than trusts, and therefore the equity or the trust itself in cases of attainder of treason seems forfeited by the statute of 33 *H. 8.* upon an attainder of *cesty qe trust* of an inheritance, tho possibly the land itself be not in the king.

But indeed, where the king or a common person is entitled to an eschete by an attainder of felony, there by the attainder of *cesty qe trust in fee-simple* the land nor trust doth not come to the king or lord by eschete, for the eschete is only *ob defectum tenentis*, and in this case the king or lord hath his tenant, as before, namely the feoffee in trust, who is to be attendant for the services to the king or lord, and by the attainder of felony of the feoffee, the lord shall have his eschete of the lands discharged of the trust; and besides; an attainder of felony is not within the statute of 33 *H. 8. cap. 20.* and so it was resolved by all the court in the exchequer, *M. 21 Car. 2.* wherein the case was thus. (*b*)

10 *Martii 1 Car. 1.* a long lease of the manor of *Bony Tracy* came to *Sir Ralph Freeman.*

4 *Car. 1.* The fee-simple thereof was conveyed to *Sir George Sands* and his heirs in trust for *Sir Ralph Freeman.*

July 1633. *Sir George* having issue two sons, *Freeman Sands* and *George Sands*; *Sir Ralph Freeman* devised part of the manor to *Freeman Sands* and his heirs, and other part thereof to *George* the son and his heirs, and devised all the rest of the manor to *Freeman Sands* and *George* his brother, and all such other sons as *Sir George* should have by *Jane* his wife, and their heirs, and made *Sir George Sands* and *Ralph Freeman* executors, and appointed them to convey the term according to these trusts.

Ralph Freeman the executor refused, *Sir George* took administration alone to him and his wife *cum testamento annexo.*

1635. *Freeman Sands* died without issue; *George* being his brother and heir.

Afterwards Sir George by *Jane* his wife had issue another *Freeman Sands*, but no conveyance was executed of the term or inheritance.

1655. *Freeman Sands* murdered his brother *George*, who dying without issue all that right or trust, that was in *George* the brother, descended and survived to *Freeman*.

7 Aug. 1655. *Freeman* the son was attainted of felony.

23 Nov. 1655. Sir *George* takes administration to his son *George*.

The land being held of the king, as of the manor of *East-Greenwich*, the king's attorney preferred an information against Sir *George Sands* in the exchequer-chamber to have a conveyance both of the term and inheritance to be executed by Sir *George Sands* unto the king, being the lord of whom the land was held; but it was *unâ voce* resolved, 1. That as to the inheritance, tho there were a trust for *George* the son, and that trust descended unto *Freeman* the murderer, as his brother and heir, and was in him at the time of the death of his brother and at his attainder, as to the greatest part of the lands, and as to the residue of the lands the trust was originally for *Freeman Sands*, yet in as much as Sir *George Sands* continued seized of the fee-simple, and so was tenant to the king, tho subject to a trust; yet the trust escheted not to the crown, but Sir *George* held it discharged of the trust. 2. That the term for years was not extinguished in law by the accession thereof to Sir *George*, as executor or administrator, tho Sir *George* had the fee-simple, because it was *en autre droit*, that he had the term. 3. That if the term for years had been a term in gross in trust for the party attaint, then by the attainder of felony the king had been entitled thereunto, not in point of eschete, but by his prerogative, having *bona & catalla felonum*. 4. But this term being to attend the inheritance the trust thereof was not like the trust of a chattle in gross, but was to wait upon the inheritance (and otherwise it had been impossible for the greatest part to have descended from *George Sands* to his brother *Freeman Sands*, unless it waited upon the trust of the inheritance) therefore the inheritance remaining in Sir *George* now discharged

charged of the trust by the attainder of *Freeman Sands* the trust of the term shall also remain in him, for it is a kind of incident or appurtenant to the inheritance.

And in this case the case of *Sir Walter Raleigh* was cited, which was *Mich. 7 Jac. in Camera Scaccarii*. *Sir Walter Raleigh* being possessed of a long term for years of the manor of *Sherburn*, intending to obtain the inheritance assigned this term to his son an infant upon pretense for a trust for his son, but really in trust for himself.

Sir Walter Raleigh then purchased the inheritance and made a settlement upon his son, but the same was defective, whereby the fee-simple remained in *Sir Walter*.

1 *Jac.* *Sir Walter* was attainted of treason, and afterwards the king granted all the goods and chattles real and personal of *Sir Walter* to *Shelbury* and *Smith* in trust for *Sir Walter's* wife and children.

Sir Walter Raleigh was executed, and upon an information in the exchequer, *M. 7 Jac.* it is declared and decreed, that the lease was in trust for *Sir Walter*, and therefore forfeited by his attainder, as well as if it had continued in him, and that it should be cancelled, and not incumber the reversion in fee-simple.

So that according to this resolution this trust for *Sir Walter* was not a chattel, for then it had passed to *Shelbury* and *Smith*; but it was a kind of appurtenant to the inheritance, and together with it was forfeited by the attainder, the conveyance of the inheritance being defective, and accordingly at this day it is held by those, that derived under the patent of king *James*.

6. At common law the king by attainder of treason was not entitled to any chattles, that the party had *en autre droit*, as executor, or administrator, or in right of a corporation aggregate.

But the husband possessed of a term in right of his wife forfeits it by attainder of treason, felony, or outlawry; but as to lands of inheritance, if the husband be seized in right of his wife, and is attainted of treason, the king hath the freehold during the coverture; and so if tenant for life be attainted

tainted of treason, the king hath the freehold during the life of the party attainted; and so he had before the statute of 26 H. 8. by the attainder of tenant in tail.

Touching forfeitures for treason by a corporation sole, or aggregate, somewhat is observable.

At common law and still to this day in the case of a corporation aggregate, as dean and chapter, mayor and commonalty, where the possessions are in common in the aggregate corporation, nothing was or is forfeited by the attainder of the head of the corporation, as the dean, mayor, &c.

At common law a sole corporation, as an abbot, bishop, dean, prebendary, parson, vicar by attainder of treason forfeited to the king the profits of their abbey, bishoprick, prebend during their incumbency; but their successors were not bound by that forfeiture, for tho the profits, as they arose belonged to their persons, yet the inheritance was in right of their church, and so not forfeited.

But by the general words of the statutes of 26 and 33 H. 8. and by the exclusive saving of the rights of others, *other than the successors of the persons attaint*, these sole corporations forfeited the inheritance, and their successors were bound by such attainder; for it is apparent that H. 8. had not only in prospect the dissolution of monasteries, but had a resolution to curb the clergy, who were too obsequious to the pope and his power.

And therefore there were several attainders of abbots of high treason, whereupon the king seized their possessions, as dissolved thereby, as appears by the statutes of 27 H. 8. *cap.* 28. and 31 H. 8. *cap.* 13. touching monasteries, tho the king rested not barely upon such attainders; but by the statutes of 27 and 31 H. 8. their possessions are settled in the crown by those acts, and with this agrees the book of *Dy.* 289.

And therefore we may observe in the statute of 1 *Mar. sess.* 2. *cap.* 16. for the attainder of the archbishop of *Canterbury* a cautious proviso was added, that it should not prejudice his successors touching the possessions of his see; this was to avoid the question, that otherwise might have arisen upon the general words of the forfeitures thereby enacted.

But now by the act of 5 & 6 Ed. 6. cap. 11. this matter seems to be settled, for whereas by the statute of 26 H. 8. cap. 12. a person attaint of treason is to forfeit all the lands; which he had by any right, title or means, saving the right of others, other than the heirs and successors of the person attaint, which confiscated the inheritance of sole corporations attaint of treason, the statute of 5 & 6 E. 6. cap. 11. enacts specially, that persons attaint of treason shall forfeit the lands, which they have of any state of inheritance in their own right, and saves the right of all persons, other than the persons attaint and *their heirs*, which restores and preserves the right of *successors*, as it was at common law.

7. By the common law all hereditaments, whether lying in tenure or not, as rents, advowsons, commons; corodies certain, are forfeited to the king by attainder of treason; but such inheritances, as lie purely in privity, appropriate to the person, are not forfeited neither at common law, nor by any special statute, as a foundership, or corody uncertain.

8. At the common law by attainder of felony or treason of the husband the wife lost her dower: by the statute of 1 E. 6. cap. 12. no attainder of treason or felony excludes her dower; but by the statute of 5 & 6 E. 6. c. 11. the husband attaint of treason the wife shall lose her dower; and so it stands at this day, except in treasons enacted by particular statutes, where dower is saved to the wife, notwithstanding the attainder of her husband of treason, as upon the statute of 5 Eliz. cap. 11. for clipping money, 18 Eliz. cap. 1. for impairing money, 5 Eliz. cap. 1. refusing the oath of supremacy the second time, and some others.

And thus far concerning the things forfeited by attainder of treason, now.

II. I shall consider in what kind or degree the king hath these forfeitures of lands.

i. Altho these be called royal eschetes, yet the king is not in purely as by an eschete, for he hath those forfeitures *in jure coronæ* of whomsoever the lands be immediately held; yea, tho they are held immediately of the king, he hath them not in point of eschete, but *jure coronæ* or *prærogativæ regalis*.

47 E. 3. 21. b. A manor is held of the king as of his honor of *D.* and the manor eschetes for the felony of the tenant, it is now parcel of the honor, and therefore by the book if the king grant it out again generally, it shall be held of the honor, but if it eschete for treason, it is no parcel of the honor, and if it be granted out generally it shall be held *in capite*, 6 E. 3. 32. a. *accordant adjudge*: vide the case of *Saffron Walden*, *More's Rep. n. 301.* (i) & *ibidem n. 405.* the case of the borough of *Southwark.* (k)

2. Where land comes to the crown by attainder of treason all mesne tenures of common persons are extinct; but if the king grant it out, he is *de jure* to revive the former tenure, for which a petition of right lies. 46 E. 3. 19. (l)

3. If tenant in tail of the gift of the king, the reversion in the king, make a lease for years, and then is attainted of treason, the king shall avoid that lease, for the king is in of his reversion, tho the tenant in tail have issue living: this hard case is so adjudged in Commentaries *Austin's case (m) in fine*, and yet if such tenant in tail had after such lease bargained and sold, or levied a fine to the king, he should be bound by such lease as long as there is issue. *H. 22 Jac. B. R. Croker and Kelsy (n), 1 Rep. Alton Woods case.* (o)

III. The *third* thing I propounded was the consideration of the eschetes in case of treason to such as have royal franchises, or counties palatine, as *Durham, &c.*

1. At common law divers lords had by special grant or in right of their counties palatine royal eschetes of the lands held within their franchises of persons attaint of treason against the king.

Such was the royal franchise of the manor of *Wreck* in *John Darcy's case*, 6 E. 3. 31. b.

It appears in the parliament-roll 9 E. 2. m. 8. that the bishop of *Durham* claimed among divers franchises between the waters of *Tyne* and *Tese*, and *Norhamshire* and *Bedlingtonshire* in the county of *Northumberland*, the forfeitures of war, namely the

(i) *Mo. 159.*

(k) *Mo. 257.*

(l) I take it this should be *H. 46 E. 3. Petition 19.*

(m) *Plowd. 560. a.*

(n) *Cro. Jac. 688. 1 R. A. 843.*

(o) *1 Co. 40. b.*

the lands of those, who held lands within that precinct, who adhered to the enemies of the king.

And after many debates in parliament 2 E. 3. that liberty was allowed him by the judgment of the king and his council in parliament.

Claus. 1 E. 3. part 1. m. 10. and p. 2. m. 20. the precedents of the allowance of that liberty being produced, viz. that *Anthony* bishop of *Durham* had the forfeiture of *Castrum Bernardi* by the forfeiture of *John de Baliol*, the manors of *Hert* and *Hertness* by the forfeiture of *Robert Bruce*, the manor of *Gretham*, that was *Peter of Montfort's*; and, upon the consideration of the several pleadings in those cases, *concordatum est per nos & totum concilium nostrum in ultimo parlamento, quòd episcopus habeat suam libertatem de hujusmodi forisfacturis juxta tenorem & effectum cartæ proavi nostri, ideo vobis mandamus, (viz. the custos of these lands) quòd de terris & tenementis infra libertatem episcopatus prædicti, & in prædictis locis de Northamshire & Bedlingtonshire in manu nostrâ & in custodiâ nostrâ per forisfacturam guerra existentibus manum nostram amoveas vos ulterius de eisdem non intromittatis*, and the like particularly after *Claus.* 1 E. 3. part 2. m. 20. *an amoveas manus* for all the lands of *Guido de Bello Campo Comes Warwick*, *qui de rege tenuit in capite infra libertatem episcopatus Dunelmensis*, and likewise for the manors of *Gainsford*, *Hert* and *Hertness* in the hands of *Roger de Clifford* seized for the forfeiture of war of *John de Baliol* and *Robert Bruce*; only the patentees not to be put out without an answer.

So that it is apparent, that at common law the bishop of *Durham* had the royal forfeitures of war (which was treason) for such lands as were within his liberty, tho they were formerly held of the king immediately *in capite*, if they lay within the precinct of his county palatine; and tho by the statute of 7 E. 6. the said bishoprick was dissolved, yet by the statute of 1 Mar. parl. 2. cap. 3. that act is repealed and the bishoprick with its franchises revived.

2. Yet farther, tho this act of 25 E. 3. declares, that all such forfeitures belong to the king, yet this act did not derogate from the franchise of the bishop of *Durham* or others, that

that had that royal liberty of forfeitures for treason, because it was in effect but a declaration of the common law, or at least an ascertaining of it without prejudice to those, that had these franchises of royal forfeitures, either by charter, or by reason of their county palatine by prescription; and this is agreed by all the judges in the case of the bishop of *Durham*, P. 12 *Eliz. Dy.* 288. and accordingly *Rot. Parl.* 1 *E. 4. n.* 20. *Œ sequentibus*, where by act of parliament a great many noblemen, that were of the party of *H. 6.* were upon the coming of *E. 4.* to the crown attainted and their lands forfeited to the king; and such as were within the county palatine of *Lancaster* annexed to the duchy of *Lancaster*, and the rest lodged in the crown; yet there is a special provision and exception of the lands within the bishoprick of *Durham*, viz. between the waters of *Tyne* and *Tese*, and in the places called *Norhamshire* and *Bedlingtonshire* within the county of *Northumberland*, in which liberty and place the bishop of *Durham* and his predecessors of time, whereof there is no memory, have had royal right and forfeiture of war in the right of the cathedral church of *St. Cuthbert* of *Durham*, as by concord in parliament in the time of the progenitors of our lord the king *Edward IV.* it hath been assented.

3. Altho by the statute of 26 *H. 8.* and 33 *H. 8.* before-mentiond it is enacted, that the king shall have the forfeiture of all lands, &c. of the persons attainted of treason, yet in as much as in those acts there is a saving of the rights of others, the forfeitures for all treasons, that were within the statute 25 *E. 3.* and consequently were treasons at common law, by tenant in fee-simple, are saved to the bishop of *Durham* and those, that have such royal franchises of forfeiture of treasons; for these stand as they did before by the opinion of five judges against four. P. 12 *Eliz. Dy.* 289. in the bishop of *Durham's* case.

4. But as to the forfeiture for new treasons enacted by any of those statutes the lords of franchises shall not have their franchise; this was agreed by all: but those new treasons that were enacted in the time of *H. 8.* or before, are all repealed by the statute of 1 *Mar. cap.* 1.

5. But as to treasons, that stood by the statute of 25 E. 3. and therefore not repeal'd by 1 Mar. cap. 1. yet as to the forfeitures of tenants in tail, or of lands in the right of churches or monasteries, the person that hath *jura regalia* shall not have them, because the king before the act of 26 H. 8. was not entitled to the forfeitures of those estates; and the statute of 26 H. 8. stands unrepeal'd as to the forfeitures for treasons within the statute of 25 E. 3. these are the points resolv'd in that case of 12 Eliz.

And therefore it is observable, that in the statutes of 5 Eliz. c. 11. whereby clipping is made treason, tho the forfeiture of lands is only during the offender's life, and no corruption of blood, nor loss of dower, yet there are special proviso's, that all persons, which have any lawful grant to hold and enjoy the forfeitures of lands, tenements, goods or chattles of offenders, and men attaint of high treason within any manor, lordship, town, parish, hundred, or other precinct within the realm of *England* and *Wales* shall and may at all times have like liberty to take, seize, and enjoy all such forfeitures of lands, tenements, goods, and chattles, as shall come or grow within their liberties by force of the attainder of any person upon any offense made treason by this act, as they might have done by virtue of any grant to them heretofore made.

I do not find the like clause to my remembrance in any other acts of new treason either in that of 1 Mar. sess. 2. cap. 6. for counterfeiting the privy signet or sign manual, or in that of 1 & 2 Ph. & Mar. cap. 11. for importing forein counterfeit coin made current by proclamation, or in that of 18 Eliz. cap. 1. concerning washing of coin, nor in any of those temporary acts made for the safeguard of the queen's person, &c. so that upon the reason of the resolution of 12 Eliz. the patentees of goods or lands of traitors by patents granted before those acts, and particularly the bishop of *Durham*, whose claim is by prescription, cannot have the goods or lands of persons attainted for those new treasons: *vide* 13 Eliz. cap. 16. a special provision in the act of attainder of the earl of *Westmoreland* and others for the rebellion in the *North*,

that the queen shall have and hold against the bishop of *Durham* and his successors the lands, tenements, goods and chattles of the persons attainted within the county palatine and franchise of the said bishop.

Nay, I cannot see how the bishop of *Durham* can either by his antient charters or prescription claim the goods or lands of persons attaint for bringing in counterfeit coin contrary to the statute of 25 E. 3. for it seems that that was not treason at common law, as may reasonably appear by what has been before said touching that subject.

C H A P. XXIV.

Concerning declaring of treasons by parliament, and those treasons that were enacted or declared by parliament between the 25 of E. 3. and the 1 Mar.

ALtho the order of the statute leads us to consider of *petit treason* in the next place, yet because I intend to absolve the whole discourse of high treason and misprision of treason, before I descend to crimes of an inferior nature, I shall proceed to a full consideration of the whole matter specially relating to high treason, and so far as the same is not common to other capital offenses: the statute therefore proceeds, “ And
 “ because many other like cases of treason may happen in time
 “ to come, which a man cannot think nor declare at this
 “ present time, it is accorded, that if any other case sup-
 “ posed treason, which is not above specified, doth happen
 “ before any justice, the justice shall tarry without going to
 “ judgment of the treason, till the cause be shewed and declared

“ before the king and his parliament, whether it ought to be
“ judged treason or other felony ; and if *per case* any man of
“ this realm ride armed covertly or secretly with men of
“ arms against any other to slay him or rob him, or take
“ him or detain him, till he hath made fine or ransom to
“ have his deliverance, it is not the mind of the king or his
“ council, that in such case it shall be judged treason, but
“ shall be judged felony or trespass according to the law of
“ the land of old time used, and according as the case re-
“ quireth, &c.

This clause consists of two parts, the former, how treasons not specially declared by this statute shall for the future be settled. 2. It declareth, that a particular offense therein mentiond, that was in truth formerly held to be treason, shall not for the future be taken to be so.

As to *the former* of these clauses touching the declaring of treasons not declared by this act, I shall pursue the history thereof at large in what follows, only at present I shall subjoin these few observations.

1. The great wisdom and care of the parliament to keep judges within the bounds and express limits of this act, and not to suffer them to run out upon their own opinions into constructive treasons, tho in cases, that seem to have a parity of reason (*like cases of treason*) but reserves them to the decision of parliament : this is a great security, as well as direction, to judges, and a great safeguard even to this sacred act itself.

And therefore, as before I observed in the chapter of levying of war, this clause of the statute leaves a weighty *memento* for judges to be careful, that they be not over hasty in letting in constructive or interpretative treasons, not within the letter of the law, at least in such new cases, as have not been formerly expressly resolved and settled by more than one precedent.

2. That the authoritative decision of these *casus omitti* is reserved to the king and his parliament, *viz.* the king and both his houses of parliament, and the most regular and ordinary way is to do it by a bill declaratively ; and therefore
altho

altho we meet with some declarations by the lords house alone in some particular cases, as in that of the earl of *Northumberland* anno 5 H. 4. and that of *Talbot* 17 R. 2. tho they be decisions and judgments of great weight, yet they are not authoritative declarations to serve this act of 25 E. 3. but it must be by the king and both houses of parliament.

As to *the latter* of these it has been formerly discussed in the second chapter.

This at common law was held treason, and the particular reason of the adding thereof in this place was in effect to reverse the judgment given in *B. R. P. 21 E. 3. Rot. 23.* in Sir *John Gorbege's* case (a); and touching this whole matter of riding armed, &c. *vide que dicta sunt supra cap. 14. p. 135. & seq.*

Only the printed statute varies from the parliament-roll of 25 E. 3. p. 2. n. 17. for whereas it is printed in the late statutes (*covertly or secretly*) the parliament-roll is *chivach arme descovert ou secretment*, and accordingly the old written manuscript statutes are written thus, *chivach arme descovert ou en privy en le realm, &c.* which misprinting possibly hath made some mistakes in judgments given of high treason, as if to ride privily and covertly upon such a private attempt were not treason; but to ride discovert, openly, were treason, when in truth neither in one case or the other it is treason, neither at this day nor at common law, if it be only upon a particular or private quarrel, as in the case of 20 E. 1. between the earls of *Gloucester* and *Hereford* (b); and this of *Gerbege*, tho it were *more guerrino & vexillis explicatis*.

But now to resume what is before promised, *viz.* touching the first matter, namely treasons not declared by the statute of 25 E. 3. we shall find, that between that statute and 1 Mar. there were treasons enacted or declared of these kinds:

1. Such as were simply declarative treasons, or so many expositions of the statute of 25 E. 3.

2. There were new treasons, that were simply enacted, and not declared only, that were perpetual in their institution, but repealed by the statute of 1 Maria.

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3. There

(a) *vide antea p. 80. & 138.*

(1) *supra p. 135. Ryl. plac. parl. p. 77.*

3. There were new treasons, that seem only temporary or fitted to the reigns of those kings, in whole time they were made.

4. There were some treasons, that were perpetual, but more explicate declarations or rather expositions of the statute of 25 E. 3. which yet stand repealed by the statute of 1 Mar.

And here I must advise the reader to take notice of these cautions.

1. Because the hereafter mentiond statutes are many, and consisting of divers clauses, that he rely not barely upon the abstracts thereof here given, because possibly there may be mistakes or omissions in those abstracts, but peruse the statutes themselves in the books at large.

2. That tho generally it be a fair topical argument, that when offenses are made treasons by new and temporary acts, they were not treasons within the statute of 25 E. 3. for if they were, they needed not to have been enacted to be treason by new statutes, as introductive of new laws in such cases, yet that doth not hold universally true, for some things are enacted to be treason by new, yea and temporary laws, which yet were treason by the statute of 25 E. 3. as will appear in the sequel.

And therefore the statutes of 1 & 2 Ph. & M. cap. 3. 1 E. 6. cap. 12. 23 Eliz. cap. 2. making several offenses felony have this wary clause, *the same not being treason within the statute of 25 E. 3.*

And hence it was, that whereas by the statute of 13 Eliz. cap. 1. compassing the queen's death and declaring the same by writing or printing is enacted to be treason during the queen's life, but the delinquent is by that statute to be charged therewith within six months, and *Throckmorton* was generally indicted for compassing the queen's death, and the overt-act was by making a writing declaring convenient landing places for the *Spanish* forces, and the naming of divers popish gentlemen in writing, who would be assistant to that design, and communicating it to the *Spanish* ambassador, and *Throckmorton* excepted to the proceeding, because not within six months according to the statute of 13 Eliz. that exception was

over-ruled, because it was a charge of treason and an overt-act within the statute of 25 E. 3. which hath no such restriction, and thereupon he was convicted and executed. *Camd. Annals sub anno 1524. p. 298.* and the like was done upon the like exception in the case of the earl of *Arundel*; *quod vide Camd. Annals sub anno 1529. p. 426.*

3. But where an act of parliament made for the safety of the king or queen's person or government enacts any offense to be felony only, or a misdemeanor only punishable by fine and imprisonment, without that wary clause above mentiond, it is a great evidence and presumption, that the same was not treason before, and a judgment of parliament in point, for it can never be thought, that the parliament would in such cases abate the extent of 25 E. 3. or make that less than treason, which was treason by that act.

I shall as near as I can pursue the order above mentiond, but some intermixtures there will necessarily be of the many particular treasons enacted by some statutes, some of which were within the statute of 25 E. 3. and I shall follow those in every succeeding king's reign.

In the time of king *Edward III.* I find no declarations of treason after the statute of 25 E. 3.

Only I find somewhat like it in the attainder of *Thorp* chief justice of the king's bench for bribery (c) and other offenses, who was thereupon sentenced to death, before special commissioners (d) assigned *ad judicandum secundum voluntatem regis*, in respect of the oath he had made to the king and broken, whereby he had bound himself to that forfeiture, *si ale encountre son serement*: it is true he had judgment, but there was no execution; this judgment and the whole proceeding is entred in patent-roll of 24 E. 3. part 3. m. 3. dorf. and was afterwards removed into the lords house in the parliament held *in octabis purificationis 25 E. 3.* which was a year before the parliament held *Wednesday* in the feast of *St. Hillary* 25 E. 3. wherein the declaration of treason was made; and

(c) He was justice of assize *in com' Lincoln*, and took bribes of several to stay an exigent upon an indictment for felony, that should have issued against them.

(d) The earls of *Arundel, Warwick, &c.*

in that parliament of *oëtabis purificationis, n. 10.* the judgment was affirmed good, *de puis qe se obligea mesme par son serement a tiel pennance, sil fait al encountre, & connusseit, quil avoit receive douns countre son dit serement :* but with this caution for the future to prevent such an arbitrary course of proceeding, *& sur ceo y fuit accord par les grants de mesme le parlement, qe si nul tiel case aveigne desore en avant de nul tiel, que nostre seigneur le roy prigne devers lui des grants; qe lui plerra, & par lour bone avyse face outre ce qe plese a sa royal seignory (e);* but this comes not to our purpose concerning treason.

As to the time of R. 2. it was a fruitful time for declaring and enhansing of treason in parliament. *Rot. Parl. 3. R. 2. n. 18. pars 1.* the case of *Jean Imperiall (f)* who was sent as agent from the duke and commonalty of *Genoa*, and coming hither by the king's safe conduct was murdered; the inquisition before the coroner was brought into parliament, and in pursuance of this clause of 25 E. 3. it was declared by the king, lords and commons, to be treason.

This declaration being by the king and both houses of parliament was a good declaration pursuant to the act of 25 E. 3. but is not of force at this day, 1. Because it was but a particular case, and extended not to any other case, as a binding law but only as a great authority. 2. Because it being not within the exprefs provision of the statute of 25 E. 3. it stands wholly repealed as treason by the statutes of 1 E. 6. and 1 *Marie.*

Rot. Parl. 1 R. 2. n. 38. the judgment against *Gomeney*s and *Weston* for betraying the king's castles in *France* mentiond before *cap. 15. p. 168.* where *Weston* had judgment to be drawn and hanged; this judgment was given by the lords at the petition of the commons in parliament, but makes not much in the point of declaration of treason, because, 1. If done, as is supposed, by treachery and bribery, it was an adherence to the king's enemies. 2. Being a declaration or judgment only by the lords, and not formally by the king, lords and commons, it

(c) There is likewise a proviso added, that this should not be drawn into precedent, *sed solummodo versus eos, qui prædictum sacramentum fecerunt & fre-*

gerunt, & habent leges Angliæ regales ad custodiendum.

(f) *Co. P. C. p. 8. vide supra p. 83.*

it is not such a declaration of treason, as the act of 25 E. 3. requires in cases of treason not thereby declared.

Rot. Parl. 11 R. 2. *pars* 2. *per totum*, the great appeal in parliament by the duke of Gloucester and others against the archbishop of York, duke of Ireland, Tresilian, Uske, Blake, Holt, and others containing divers articles, which surely were not treason within the statute of 25 E. 3. yet had judgment of high treason given against them by the lords in parliament. (g)

Upon the impeachment of the commons against Simon Burle, Beauchamp, and others, many of them had likewise judgment of high treason given against them by the lords in parliament. (*)

Altho the king did in some kind outwardly agree to these judgments, and the commons were active in it, and *Rot. Parl.* 11 R. 2. *pars* 1. n. 50. public thanks were given to the king by the lords and commons in full parliament, *de ceo, qil lour avoit fait cy plein justice*, yet this was no declaration of parliament of treason pursuant to the statute of 25 E. 3. because the king and commons did not consent *per modum legis declarative*, for the judgment was only the lords. 2. Because it was but a particular judgment in a particular case, which was not conclusive, when the like cases came before judges.

This parliament of 11 R. 2. was repealed by the parliament of 21 R. 2. and that of 21 R. 2. also repealed, and the parliament of 11 R. 2. enacted to be holden according to the purport and effect of the same by the statutes of 1 H. 4. *cap.* 3 & 4. but this did not alter the statute of 11 R. 2. and make those judgments, which were given by the lords in 11 R. 2. of any other value than they were, and consequently amounted not to any declaration by parliament, that these which the lords adjudged treasons in 11 R. 2. were or ought to be so held; and if any such construction might be made upon the confirmation of 1 H. 4. *cap.* 4. yet the same was repealed by the statute of 1 H. 4. *cap.* 10. in the same parliament; and if not, yet certainly 1 E. 6. and 1 Mar. have wholly taken away the force of those declarations, as shall be shewed.

(g) See *State Tr.* Vol. I. p. 1.(*) *Ibid.* p. 15.

Rot. Parl. 17 R. 2. n. 20. Talbot's case, in conspiring the destruction of the dukes of *Aquitain* and *Gloucester* the king's uncles, and other great men, *Et sur ce firent divers gents lever armies & arrayes a faire guerre en assembles & congregations in tres grand & horrible nombre*: this was declared treason by the lords in parliament; and a proclamation issued to render himself, or otherwise to be attainted of treason: how far this was treason or not within the statute of 25 E. 3. hath been before considered, but certainly, if it were no treason declared by the particular purviews of 25 E. 3. it is no such authoritative declaration of treason in parliament, as this act requires in treasons not declared; and if it were such an authoritative declaration, it binds not now as such, because all treasons are reduced to those expressed in the statute of 25 E. 3. by the statutes of 1 H. 4. cap. 10. 1 E. 6. cap. 12. 1 Mar. cap. 1. and treasons declared, as well as new treasons enacted, are by these statutes set aside, farther than the very declaration of 25 E. 3. extends.

Rot. Parl. 21 R. 2. *quod vide inter statuta* 21 R. 2. cap. 2, 3, 4, 12. some new statutes of treason were enacted, others were declared; by cap. 2. it is enacted, that the procurers of any new commission like that, (for the obtaining of which the archbishop of *Canterbury*, &c. were in that parliament attainted) being convicted in parliament should be guilty of high treason: again, cap. 3. If any be convicted in parliament of the compassing of the king's death, or to depose him, or to render up his homage to him, or of raising war against the king; and cap. 4. The procurers or counsellors to repeal the judgments given in that parliament, if convicted in parliament, are guilty of high treason: other treasons were declared, as namely those nine rank answers to the king's questions, which are all recited and affirmed, and adjudged good and sufficient by the 12th chapter of that parliament; other points were judged, as namely, that the procuring of the commission for regulating the miscarriages in government *anno* 7 R. 2. and the execution thereof by the archbishop of *Canterbury* and others was high treason.

And tho it is true, that some of the points enacted to be treason by the 3d chapter were in truth treasons by the statute of 25 E. 3. if there were an overt-act, namely compassing the death, or deposing the king, or levying war, yet these statutes and these declarations by the parliament of 21 R. 2. are wholly set aside; and the statute of 25 E. 3. governs the whole matter of high treason, notwithstanding any of the extensions, enactings, or declarations of the parliament of 21 R. 2. or any of the judges therein mentiond, *viz.* *Belknap, Tresilian, Holt, Fulthorp, Burgly, Thirlinge, Birkhill* and *Clopton*, for the parliament of 21 R. 2. is wholly repeald by 1 H. 4. cap. 3 & 4. and the parliament of 11 R. 2. wherein *Belknap* and *Tresilian* were judged traitors for delivering those extravagant opinions (*b*) is revived and affirmed; and also by the statutes of 1 E. 6. and 1 Mar. the treasons enacted or newly declared by the parliaments of 11 & 21 R. 2. are repeald.

And tho those opinions of the judges *Tresilian, Thirlinge* and the rest had the countenance of the parliament of 21 R. 2. yet they had the discountenance of the parliament of 11 R. 2. and 1 H. 4. which repeald the parliament of 21 R. 2. and stand at this day unrepeald in their full strength, excepting only such treasons as were newly made, or newly declared by those parliaments: tho the statutes of 1 E. 6. and 1 Mar. have taken away those treasons, which either the statute of 11 R. 2. or 1 H. 4. had introduced more than were in the statute of 25 E. 3. yet it hath not taken away the efficacy of the parliaments of 11 R. 2. and 1 H. 4. as to their declarations, that the extrajudicial opinions of those judges were false and erroneous; but in that respect the parliaments of 1 H. 4. and 11 R. 2. are of force, as to the damning of those extravagant and unwarrantable opinions and declarations.

I come now to the time of *Henry IV.* wherein I find little: *in anno primo* in parliament *inter Placita Coronæ*, *John Hall* was convict before the lords in parliament of the murder of the duke of *Gloucester*, and judgment given by the lords *per assent du roy*, that altho it were only murder, yet the offender should have the judgment of high treason, *viz.* to be drawn,
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hanged,

hanged, embowelled, his bowels burnt, his head cut off, and quartered, and his head sent to *Calice*, where the murder was committed, which was executed by the marshal accordingly: this was no declaration of treason, but a transcendent punishment of the murder of so eminent a person.

1 *H. 4. cap. 10.* “ It is accorded, that in no time to come any treason be judged otherwise than it was ordained by the statute of king *Edward III.*” This at once swept away all the extravagant treasons introduced in the time of *R. 2.* either in over much favour of popularity, or over much flattery to prerogative, for they were of both sorts.

Rot. Parl. 5 H. 4. n. 12. There is a declaration of an acquittal of the earl of *Northumberland* from treason; *quod vide antea cap. 14. p. 136.* but I find no declaration nor act of new treason, in the time of *H. 4.* he was as good as his promise by the act of 1 *H. 4. cap. 10.* for he contented himself with the declaration made by 25 *E. 3.*

In the time of *H. 5.*

By the statute of 2 *H. 5. cap. 6.* “ It is ordained and declared that manslaughter, robbery, spoiling, breaking of truce, and safe conducts, and voluntary receipt, abetment, procurement, concealing, hiring, sustaining, and maintaining of such persons to be done in time to come by any of the king’s subjects within *England, Ireland, or Wales,* or upon the main sea shall be judged and determined treason done against the king’s crown and dignity; and the conservator of the truce to have power by the king’s commission and by the commission of the admiral to inquire thereof:” But this statute as to treason is particularly repealed by the statute of 20 *H. 6. cap. 11.* but whether the general statutes of 1 *E. 6. cap. 12.* 1 *Mar. cap. 1.* had repealed it as to treasons done upon the sea may be a question, because it hath been ruled, that those statutes extend not as to trials of treason done upon the sea by the statute of 28 *H. 8. cap. 15. de quo infra.*

The statute 3 *H. 5. cap. 6 & 7.* it is true, is a declarative law, that clipping, washing and filing the king’s coin is treason within the statute of 25 *E. 3.* and judges of assise and justices of peace have cognisance thereof; but even this declarative

rative law is repealed by the statute of 1 *Mar.* as it is declared in the statute of 5 *Eliz. de quo antea.*

As to the judgment of treason given in Sir *John Oldcastle's* case, *Rot. Parl. 5 H. 5. par. 1. n. 11.* tho the judgment be given in parliament, yet it is barely upon the account of compassing the king's death, and of levying of war, which was expressly within the statute of 25 *E. 3.* as appears before *cap. 14. p. 142.*

Touching the times of *H. 6.*

Rot. Parl. 2 H. 6. n. 12. It appears, that *John Mortimer* was committed for suspicion of treason against *H. 5.* and 23 *Feb. 2 H. 6.* brake prison, and escaped, for which he was indicted 25 *Feb. 2 H. 6.* at *Guildhall, London,* before commissioners of oyer and terminer setting forth the matter, and that *prisonam prædictam falsò & voluntariè fregit*; the record by the king's command was sent into parliament, and by the king's commissioner *ad tenendum parliamentum,* and the lords at the request of the commons, it was affirmed a good indictment, and *Mortimer* had judgment to be drawn, hanged and quartered, and his lands and goods forfeited to the king by the judgment of the lieutenant, lords, and commons, by an act made then for that purpose.

This it is true was an authoritative declaration of treason in this particular case pursuant to the clause of the statute of 25 *E. 3.*

But it rested not here, for in the same parliament, *n. 60.* a general statute passed, “ Que si ascun person soit indite, “ appelle ou prise par suspicion de grand treason & pur cest “ cause soit commisse & detenus in prison & escape volunt- “ terement hors du dit prison, que tiel escape soit adjudge & “ declare treason, si tiel person ent soit duement atteint se- “ lon la ley de terre. Et eient les seigneurs de fee en tiel cas “ les eschetes & forfeitures de terres & tenements de eux “ tenus par tiel persons issint atteints, come de ceux, que “ sont atteints de petit treason; Et teigne cest estatute lieu “ & effect del 20 jour de *Octobre* darrein passe tanque al pro- “ chein parlament.

“ *Ro'.* Soit fait, come est desyre par la petition.

This parliament began 20 Oct. 2 H. 6.

The things observable hereupon are these, 1. That to rescue a person, that is a traitor, out of prison was treason at common law, and so continues at this day within the statute of 25 E. 3. 2 *Co. Instit.* p. 589. and 1 H. 6. 5. b. 2. But if a man committed for treason breaks prison and escapes, this is not treason at common law. 3. Tho it be felony by the statute *de frangentibus prisonam*, yet it is not made treason by that statute. 4. But if it were treason by that statute, yet it is corrected and made not treason by the statute of 25 E. 3. and 1 H. 4. and therefore in this case it was made treason merely by the judgment of parliament, and statute of 2 H. 6. was but temporary and expired by the next parliament. 5. That the judgment itself in *Mortimer's* case, tho an authoritative declaration, was not at all binding in other cases for two reasons, 1. Because it is checked and controld as to any such effect by the general act of parliament of 2 H. 6. which was to continue only to the next parliament; and 2. Because it was but a particular judgment of parliament in that particular case, to which it was particularly applied.

But howsoever, that question is now put out of question by the general act of 1 Mar. cap. 1. which enervates the force of this judgment and declaration; for 1 Mar. repeals declarative laws of treasons as well as enacting laws, and leaves the judges to judge strictly according to the statute of 25 E. 3. as if no such judgment had been given in parliament. 2 *Co. Instit.* p. 589. and therefore it seems strange to me, that the judges took any notice of 2 H. 6. in *Bensted's* case to ground any opinion on. (i)

And therefore, altho in the late act of attainder of the earl of *Strafford*, there was a proviso added, that it should not be construed, that the treasons therein charged should be a rule for judges to proceed by in other cases, it seems a cautious

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(i) *Cro. Car.* 583. *Jones* 455. It was the case in 1 H. 6. 5. b. and not the statute of 2 H. 6. on which the judges grounded their opinion, altho as that opinion is express in *Cro. Car.* 583. and *Kel.* 77. viz. that the breaking of a prison, wherein traitors be, is high treason, tho the parties did not know, that there were traitors there, is not warranted by that case, which is of one, who brake prison, *knowing certain persons to be prisoners in the said prison for treason.*

but needless proviso, because it was a particular judgment, that did not *egredi personam*, and no general declarative law to serve the statute of 25 E. 3. For there may be collateral reasons not only in policy, but in justice sometimes for a parliament to vary the punishment of crimes, in substance the same, when differenced by circumstances, in several persons.

8 H. 6. cap. 6. Burning of houses maliciously or wickedly to extort sums of money from those, whom the malefactors spare, is made high treason with a retrospect to the first year of the king's reign, saving to the lords their liberties, as in case of felony.

Two things are observable upon this act, 1. That had it not been specially provided against, the lords had lost their eschetes by making it treason. 2. That this act, tho perpetual in its constitution, yet was repealed by 1 Mar. cap. 1. and after that repeal it remained felony, as it was before, and so continues to this day.

Rot. Parl. 11 H. 6. n. 43. A petition that *John Carpenter*, who had committed a barbarous murder upon his wife, for which he was outlawed and in prison in the king's bench, might for example's sake by authority of parliament be judged a traitor, and that the judges might give judgment against him to be drawn and hanged, saving to the lords their eschetes. *Ro'. Pur ceo, quil semble encountre le liberty de seint esglis le roy se aviserà.*

20 H. 6. cap. 3. The coming of people out of *Wales* or the marches of the same into the counties adjacent, and taking and driving away cattle, and their abettors and receivers knowing thereof, is made treason against the king, saving to the lords marchers, of whom the offenders, receivers or abettors held their lands, the forfeiture thereof and of their goods and chattles, when attainted; this act was to continue for six years: *nota*, the lords had lost their eschetes and forfeiture of the offenders goods, if it had not been specially provided for, because made treason and a new treason, which was not before, for the lord marchers had not only forfeiture of goods of felons, but royal eschetes and forfeiture of traitors goods
for

for the most part; but that franchise, which was by prescription, could not extend to new treasons.

I find nothing more relating to this matter in the time of *Henry VI.*

The impeachment of the duke of *Suffolk* by the commons for treasons and misdemeanors contained many articles of high treason within the statute of 25 *E. 3.* namely, *adhering to the king's enemies*; but the whole matter being at last left to the king, he was declared by the king clear of the treasons, and for the rest the king by a kind of composition ordered him to be banished for five years. *Rot. Parl. 28 H. 6. n. 18; 19, 20, &c.*

As to the reigns of *Edward IV.* and *Richard III.* tho in those great revolutions, that happend in the latter end of *Henry VI.* the beginning of *Edward IV.* the time of *Richard III.* there are many acts of attainder of treason of particular persons, that adhered to either party then contending for the crown, according as the success of war fell to one side or the other, as namely *Rot. Parl. 38 H. 6. n. 1.---36, &c.* many of the duke of *York's* party were attainted of treason by act of parliament. *Rot. Parl. 1 E. 4. n. 6.---15, &c.* the numerous companies of the party of *Henry VI.* were attainted by parliament; the like was done in the short regrest of *H. 6. 11. E. 4.* in a parliament held in that short resumption of the crown by *Henry VI.* Again, the like was done in the parliament of 12 *E. 4.* upon the regrest and re-expulsion of *Henry VI.* . Again, *Rot. Parl. 1 R. 3.* divers persons of great quality, that opposed the pretensions of *Richard III.* were attainted by act of parliament; and the like was again done in the parliament of 1 *H. 7.* against the assistants of *Richard III.* Every new revolution occasioned the attainder by parliament of the most considerable of the adverse party; yet in all this time I find no general declaration or general enacting of new treasons by parliament.

I come to the time of *Henry VII.*

In this time I find but one new treason, namely the statute of 4 *H. 7. cap. 18.* whereby the counterfeiting of foreign coin made current in this realm is made high treason.

But

But this act was repealed by the statute of 1 E. 6. cap. 12. and 1 Mar. cap. 1. and another act made to the same purpose in 1 Mar. sess. 2. cap. 6.

This wise prince duly considering the various revolutions, that had formerly happened in this kingdom touching the crown especially to the houses of *York* and *Lancaster*, and that every success of any party presently subjected all, that opposed the conqueror, to the penalties of treason, and weighing that, altho by his marriage with the heir of the house of *York* he had reasonably well secured his possession of the crown, yet otherwise his title, as in his own right, was not without some difficulties: he therefore made a law, not to enact treason, but to give some security against it, viz. 11 H. 7. cap. 1. “ That all persons, that attend upon the king
 “ and sovereign lord of this land for the time being in his
 “ person, and do him true and faithful service of alligance
 “ in the same, or be in other places by his commandment
 “ in the wars within this land or without, that for the said
 “ deed and true duty of alligance he or they shall be in no
 “ wise convict or attaint of high treason, nor of other of-
 “ fences for that cause by act of parliament, or otherwise
 “ by any process of law, whereby he or any of them shall
 “ now forfeit life, lands, tenements, rents, possessions, here-
 “ ditaments, goods, chattles, or any other thing, but be for
 “ that service utterly discharged of any vexation, trouble,
 “ or loss; and if any act or acts, or other process of law
 “ hereafter thereupon for the same happen to be made con-
 “ trary to this ordinance, that then that act or acts or other
 “ process of law whatsoever they be, stand and be utterly
 “ void; provided always, that no person or persons shall take
 “ any benefit or advantage by this act, which shall hereafter
 “ decline from his or their said alligance.” Upon this act these things are observable.

1. That this act was not temporary or for the life of king *Henry VII.* but was perpetual, and extended to all succeeding kings and queens of this realm, for it is for attendants upon the king or sovereign lord of this land *for the time being*

2. It is observable, that this act extendeth to a king *de facto*, tho not *de jure*, for in truth such was *Henry VII.* for his wife was the right heir to the crown, and his regal power was principally by an act of parliament made 1 *H.* 7. before his intermarriage with his queen, tho both titles were derived to his descendents, *viz.* *Henry VIII.* and in default of issue, to his sister, from whom our present sovereign is descended: and this act, tho extended to his successors, which were kings *de jure*, as well as *de facto*, yet was made for the security of himself and his servants in the first place, which appeareth more fully also by the preamble.

3. That tho this act might secure the attendants on the king in his wars against impeachments in an ordinary course of law, and might as to this purpose exempt them from the danger of any treason by the statute of 25 *E.* 3. as adherers to the king's enemies, yet it was a vain provision against future acts of parliament, whose hands could not be bound by a former act from repealing it, or taking away the effect thereof in part or in all.

It is true, since that time this kingdom hath had no great experience of changes of this nature, nor need to make use of the advantage of this statute: it is true queen *Mary* began her reign 6 *July* 1553. she was crowned 6 *Octob.* following, her first session of parliament began 5 *Octob.* 1553. which was the day before her coronation, and the second session thereof was held by prorogation 24 *Octob.* 1 *Mar.*

Upon that 6th of *July*, which was the day of king *Edward's* death, and before queen *Mary* was actually settled, the lady *Jane Gray* set up a title for herself, and continued in some kind of regal power, until the 1st of *August* following, and during those twenty-four days the styles of deeds, statutes and other things (and possibly also processes) were made in her name, and a special act was made 1 *Mar.* *sess.* 2. *cap.* 4. to make them effectual, and to be pleadable in the style, name, and year of queen *Mary*; so that the lady *Jane* seemed an intruder for about twenty-four days; but the truth is, she was not so much as an usurper, or a queen *de facto*: and these her assistants in that business, *viz.* the archbishop

of *Canterbury*, the duke of *Northumberland*, the said lady *Jane* and divers others were attainted before commissioners of *oyer* and *terminer*; and those attainders confirmed by parliament 1 *Mar. sess. 2. cap. 16.* and note in that act of attainder a special proviso, that the possessions of the archbishoprick of *Canterbury* should not be forfeited by that attainder or act of parliament; possibly they thought that the general words of that act, or at least the statutes of 26 *H. 8.* and 33 *H. 8.* which gave forfeitures for treason against successors, and were not repealed by 1 *Mar.* might otherwise have forfeited the lands of the archbishoprick by the attainder of the archbishop; but of this *supra cap. 23. p. 252.*

4. But what was the meaning of the proviso in that act of 11 *H. 7.* "That no persons shall have the benefit of this act, who shall decline from his allegiance," is dark and dubious.

But these questions never failed to be soon decided on the victor's part by their parliaments, which were always obsequious enough in these matters to the victor, and ready to pass acts of attainders for his safety and their own, against which no security was, nor could be given by this act of 11 *H. 7.*

I come now to the reign of *Henry VIII.* which was a reign, wherein acts concerning treason were exceedingly multiplied, and they are of three kinds: 1. Such acts, as constituted or declared treason. 2. Such acts, as concerned the trial of treason. 3. Such as concerned the punishment or forfeiture of treason.

By the statute of 22 *H. 8. cap. 9.* *Richard Rose* for wilful poisoning of divers persons is by authority of parliament attainted of high treason, and that he be boiled to death: and by authority of parliament murder by wilful poisoning is made treason for the future, and the offender to be boiled to death, and not to have benefit of the clergy: justices of peace to have power to inquire of this offense, and also of counterfeiting coin of any forein kingdom, suffered to be current here, the title of lords to eschete of the lands of offenders in poisoning is saved to them. (k)

This treason is repeald by 1 *Mar. cap.* 1. and the same remains felony as before.

By 26 *H. 8. cap.* 13. “ Maliciously to wish, will, or desire
“ by words or writing, or by craft to imagine, invent, practise;
“ or attempt any bodily harm to the king, queen, or their
“ heirs apparent, to deprive them, or any of them of their
“ dignity, title, or name, or slanderously, or maliciously to
“ publish by express writing; or words, that the king, our
“ sovereign lord is an *heretic, schismatic, tyrant, infidel* or *usur-*
“ *per,* or rebelliously to detain any of his castles, &c. in this
“ realm, or other his dominions, or rebelliously to detain or
“ keep any of his ships, ammunition, or artillery, and do not
“ humbly render the said castles, fortresses, ships, or artillery
“ to our sovereign lord, his heirs or successors, or such as shall
“ be deputed by them, within six days after they be com-
“ manded thereunto by proclamation under the great seal, is
“ enacted to be treason in the offenders, their aiders, counsel-
“ lers, consenters and abettors: forein treason to be tried in
“ any county, where the king shall appoint by commission.

1. It should seem, that this act was intended to be perpetual, for in it and the subsequent clause of forfeitures it mentions the king, *his heirs and successors.* 2. Part of this seems to be treason by the statute of 25 *E. 3. viz.* the practising any bodily harm, if there be an overt-act, and also the rebellious detaining of the king's castles after summons by proclamation; the rest are purely new treasons. 3. But whether it was temporary or perpetual, all treason resting singly, as enacted by authority of this act, is repeald by 1 *E. 6.* and 1 *Mar.* and yet the latter clause (1) concerning forfeiture in relation to all treasons within 25 *E. 3.* stands unrepeald; *de quo vide supra & infra.*

By 27 *H. 8. cap.* 2. counterfeiting privy seal, privy signet, or sign manual is made treason, and the offenders, their counsellors, aiders, and abettors to suffer and forfeit, as in case of treason; this is repeald by 1 *Mar. cap.* 1. and then re-enacted by 1 *Mar. cap.* 6.

By

(1) By this latter clause the offender, hereditaments of any estate of inheritance in use or possession, by any right, and successors all lands, tenements and title or means.

By 25 *H. 8. cap. 22.* the divorce between the king and queen *Katharine* is affirmed by parliament, and also the marriage between him and *Anne Bullen*, and the crown with all dignities, honors, preeminences, prerogatives, authorities, and jurisdictions to the same annex or belonging, is entaild after the king's death to the heirs of his body lawfully begotten, *viz.* to the first, second and other sons of the king and of the said queen *Anne*, and to the heirs of their bodies successively, and for want of such issue male, to the heirs male of the king, and the heirs of their several bodies; and for want of such issue, to the lady *Elizabeth*, their daughter and the heirs of her body, and so to their second, third and other daughters, and for want of such issue, to the king's right heirs.

“ If any by writing, printing, or exterior act maliciously
 “ do or procure any thing to the peril of the king's person,
 “ or to the disturbance of the king's enjoyment of the crown,
 “ or to the prejudice or derogation of the marriage between
 “ him and queen *Anne*, or to the peril, slander, or disherison
 “ of any of the issues or heirs made by this act inheritable
 “ to the crown, it shall be high treason.

“ If any by words without writing, &c. maliciously pub-
 “ lish any thing to the slander of the said marriage between
 “ the king and queen *Anne*, or to the slander or disherison of
 “ the issues of the king's body begotten on the said queen
 “ *Anne*, or other heirs inheritable to the crown by virtue of
 “ this act, it shall be misprision of treason:” an oath is ap-
 pointed to be taken in pursuance hereof, and the refusers are
 guilty of misprision of treason; provision is made for the cu-
 stody of the heir of the crown during minority.

28 *H. 8. cap. 7.* The last act is repeald, and all interme-
 diate offenses against that act in relation to queen *Anne* or the
 lady *Elizabeth* pardoned; queen *Anne* and others attainted of trea-
 son; the marriage between the king and queen *Catharine* annulled
 and judged void, and the issues between them to be illegiti-
 mate; the marriage between the king and queen *Anne* judged
 void by sentence of divorce of the archbishop; the same sen-
 tence confirmed, and the marriage with queen *Anne* judged
 and declared null and void, and the issues between them de-
 clared

clared illegitimate and excluded from inheriting the crown: *Levitical* degrees settled. Children between the king and queen *Jane* shall be adjudged the king's lawful children, and inheritable to the crown; the crown entailed to king *Henry VIII.* and the heirs of his body lawfully begotten, that is to say, to the first, second and other sons of the king on the body of queen *Jane* begotten, and the heirs of their bodies severally; and in default of such issue male, then to the first son and heir male of his body, and so to the second and other sons in tail, and for the want thereof, to the first and other issue female between the king and queen *Jane* in tail, and for want of such issue, to the king's first and other issue female in tail, and for lack of issue of the king's body, to such person, and in such manner as he shall appoint by his last will or letters patent; provision against disturbances of the heir of his body so nominated under pain of treason; " And
" if any shall by words, writing, printing or other exterior
" act directly or indirectly do or procure maliciously any
" thing to the peril of the person of the king, his heirs or
" successors having the royal estate of the crown, or mali-
" ciously or willingly by words, &c. give occasion, whereby
" the king, his heirs or successors might be interrupted of
" the crown, or for the interruption, repeal or annullation
" of this act, or the king's disposal of the crown according
" to it, or to the slander, disturbance or derogation of the
" marriage between the king and queen *Jane*, or any other
" lawful wife, which he shall hereafter marry, or to the pe-
" ril, slander or disherison of any of the issues and heirs of
" the king limited to be inheritable to the crown, or to whom
" the king shall by authority of this act dispose it, or that
" affirm, &c. the marriage between the king and queen *Catharine*,
" or between the king and queen *Anne* to be good,
" or slander the sentences of divorce abovesaid, or publish
" their issues to be the king's lawful children, or shall at-
" tempt to deprive the king, the queen, or any made inhe-
" ritable to the crown by this act, or to whom the king by
" authority of this act shall dispose thereof, of their titles,
" styles, names, degrees, or royal estate or regal power, or

“ refuse to take an oath to answer such questions, as shall
 “ be objected to them upon any clause of this act, or after
 “ taking the oath do contemptuously refuse to answer such
 “ interrogatories, as shall be objected concerning the same,
 “ or shall refuse to take the oath enjoined by this act, they,
 “ their aiders, counsellors, maintainers and abettors shall be
 “ guilty of treason, and forfeit all their lands, &c. and all
 “ sanctuary excluded.

The form of the oath is set down in the act, and power is given to the king by will to dispose of the custody of the king's issue within age.

It is made treason to disturb such disposal, and also power is given to the king to dispose or give by will, &c. to any of his blood any title, style, name, honors, tenements or hereditaments.

Nota, This act doubted whether the attempting any thing in parliament against the marriage of queen *Anne* might not bring them in danger of the act of 25 *H. 8.* and therefore took care both to repeal the act, and to discharge and pardon what had been attempted against it.

The clause enabling the king to dispose of any honors or lands to those of his blood by will was necessary, for without such an enabling act of parliament the king could not dispose thereof by *will*, but only by *letters patents* under the great seal, or for lands parcel of the duchy of *Lancaster* under the seal of the duchy.

But it seems, that as to the disposal of lands belonging to the crown or duchy by letters patents under these respective seals, the king had power without this act, or the 35 *H. 8. cap. 1.* to dispose thereof, and to bind his successors.

And this by reason of the special penning of those acts, which, as I think, did not entail *the lands*, that the king had *in jure coronæ* or *in jure ducatus Lancastriæ*, but only limits the succession of the crown and of the dignities, honors, prerogatives, preeminences, authorities or jurisdictions to the same annex or belonging, which are but so many expressions of the parts or incidents of the regal dignity, and not of the lands or possessions of the crown, but those rested in the crown in fee-simple, as they were before those acts made.

And hence it is, that in the several acts of 34 H. 8. cap. 21. 1 E. 6. cap. 8. 18 Eliz. cap. 2. 35 Eliz. cap. 3. 43 Eliz. cap. 1. for confirmation of letters patents, there is no clause to make them good, notwithstanding the entail of the crown, for it was not needful; but the lands granted by king *Henry VIII.* *Edward VI.* queen *Mary*, queen *Elizabeth*, stand effectual without any such confirmation, and yet the entail of the crown by these acts continued till the death of queen *Elizabeth*, at which time it was spent; and king *James* succeeded to the crown as the true heir thereof, without the help of any entail or nomination by *Henry VIII.*

And yet after all this the whole scheme was altered by the statute of 35 H. 8. cap. 1. for thereby after recital of the statute of 28 H. 8. and that the king had issue by queen *Jane* prince *Edward*, and the king had since married the lady *Catharine*; It is enacted, “ That if the king and prince *Edward*,
“ die without heirs of either of their bodies, the crown shall
“ remain to the lady *Mary* and the heirs of her body under
“ such conditions, as shall be limited by the king by his let-
“ ters patents, or his last will, and for want of such issue
“ or upon breach of such conditions, to the lady *Elizabeth*
“ and the heirs of her body under such conditions, as shall
“ be limited by the king by his last will or letters patents;
“ and in default of such issue, or upon breach of such condi-
“ tions, to such persons and for such estates, as the king shall
“ limit by his will or letters patents.

This act repeals the former oath of 28 H. 8. and directs the form of a new oath to be taken for the extirpation of the pope's pretended supremacy, and limits it to be taken by all that sue livery, have any office of the king's gift, receive orders, take degrees, and by all persons whom the king, &c. shall appoint, and that it shall be treason in such, who obstinately refuse to take the oath.

It is also enacted, “ That if any person by words, writing,
“ printing or exterior act maliciously or willingly do or pro-
“ cure any thing directly or indirectly for the repeal, annul-
“ lation or interruption of this act, or any thing therein
“ contained,

“ contained, or of any thing that shall be done by the king
 “ in the limitation of the crown to be made as aforesaid, or
 “ to the peril, disherison or slander of any of the issues and
 “ heirs of the king being limited by this act to inherit and
 “ to be inheritable to the crown, or to the disherison or in-
 “ terruption of any person, to whom the crown is by this
 “ act, or shall be limited by the king as aforesaid, whereby
 “ they may be destroyed or interrupted in body or title of
 “ the inheritance of the crown, the same shall be high trea-
 “ son in the offenders, their maintainers, aiders, counsellors,
 “ and abettors, saving to all persons, other than the parties
 “ attainted, their heirs and successors, all rights, &c. in the
 “ lands of the persons attaint.

And note that notwithstanding the caution used in the act of 28 H. 8. for the pardon of the attempting to repeal the act of 25 H. 8. no such care was thought necessary here for the attempt or procurement to alter the law by act of parliament, for as it could not be restrained by a precedent act, so neither was it concerned within the penalty.

And thus much for those treasons, that related to the succession of the crown, which I have put together notwithstanding many of them come after those other acts, which I shall hereafter mention.

By the 28 H. 8. *cap.* 10. which was the great concluding act against the papal authority, the asserting or maintaining of the papal authority is brought within the statute of *præmunire*, and he, that obstinately refuseth the taking of the oath of abjuration thereby enacted, is subjected to the penalty of high treason.

By 28 H. 8. *cap.* 18. marrying any of the king's children or reputed children or his sisters, or aunts of the father's part, or the children of the king's brethren, or sisters without the king's licence under his great seal, or deflowering of any of them is enacted to be treason.

By 31 H. 8. *cap.* 8. The king and council's proclamation concerning religion or other matters are to be obeyed under such penalties, as they shall think requisite; they, that disobey them and then go beyond sea contemptuously to

avoid answering such offense, shall be guilty of treason, &c. saving to every person, other than the offenders, their heirs and successors, all right, &c.

By 32 *H. 8. cap. 25.* the marriage between the king and lady *Anne Cleve*, which had been dissolved by the sentence of the convocation, was confirmed by parliament with liberty for each party to marry elsewhere: if any by writing, printing, or exterior act, word or deed, accept, take, judge, or believe the said marriage to be good, or attempt any thing for the repeal or adnullation of this act, it shall be high treason in them, their aiders, counsellors, abettors or maintainers, saving the rights of all, other than the offenders their heirs and successors; and all persons that have acted against the said marriage are pardoned.

By 33 *H. 8. cap. 21.* Queen *Catharine Howard* was attainted of high treason, and all persons that had acted against her were pardoned: any woman, whom the king or his successors shall intend to take to wife, thinking her a pure and clean maid, if she be not so, and shall willingly couple herself in marriage to the king notwithstanding, without discovering it to the king before marriage, shall be guilty of high treason; and if any other know it and reveal it not, it shall be misprision of treason: the queen or prince's wife solliciting any person to have carnal knowledge of her, or any person solliciting the queen or prince's wife to have carnal knowledge of her is treason in them respectively, their counsellors, aiders and abettors.

By 35 *H. 8. cap. 3.* The king's style (*Henricus octavus Dei gratiâ Angliæ, Franciæ & Hiberniæ rex, fidei defensor, & in terrâ ecclesiæ Anglicanæ & Hiberniæ supremum caput*) is united and annexed to the imperial crown of *England*; and if any shall imagine to deprive the king, queen, prince, or the heirs of the king's body, or any to whom the crown is or shall be limited, of any of their titles, styles, names, degrees, royal estate, or regal power annexed to the crown of *England*, it shall be high treason, saving the right of all other than the offenders, their heirs and successors.

And thus far concerning the several treasons enacted in this king's time, all which are nevertheless now abrogated and repealed by 1 *E. 6.* and 1 *Mar.* as shall be shewn.

II. There are several acts of parliament in this king's time, which concern trials of treason, some of which are in force at this day, and not repealed by any statute.

By 26 *H. 8. cap. 6.* The treason concerning counterfeiting, washing, clipping and minishing of money current within this realm, as likewise other felonies committed in *Wales* or the marches thereof, may be heard and determined before justices of gaol-delivery in the next *English* county; but note, this extends not to other treasons, nor at this day to clipping or minishing the coin, for the acts, that made them treason at that time, *viz.* 3 *H. 5.* and 4 *H. 7.* stand now repealed, and the statutes of 5 *Eliz. cap. 11.* for clipping, and 18 *Eliz. cap. 1.* for minishing the coin, direct it to be tried by the course and order of the law; and so it is also for counterfeiting of foreign coin by the statute of 1 *Mar.* yea, and as to counterfeiting the coin of this kingdom, or any other offense touching coin by the statute of 1 & 2 *P. & M. cap. 11.* the indictment and trial is directed to be according to the course of the common law; so that as to coin also the statute of 26 *H. 8.* is now out of doors.

28 *H. 8. cap. 15.* For trial of treason committed upon the high sea before the admiral, &c. by commission under the great seal; this statute as to trial of treason upon the sea stands unrepealed by 1 *Mar.* and whether as to treasons committed in any rivers, or ports, or creeks within the bodies of counties it be not repealed by 1 & 2 *P. & M. cap. 10.* or by the statute of 35 *H. 8. cap. 2.* for trial of foreign treasons, is considerable.

By 32 *H. 8. cap. 4.* Treasons and misprisions of treason committed in *Wales* or in other places where the king's writ doth not run, shall be tried before such commissioners of *oyer* and *terminer*, as the king shall appoint, as if committed in the same counties, into which the commission is directed.

This is repealed by the statute of 1 & 2 *P. & M. cap. 10.* cited to be so adjudged in *H. 14 Eliz. (m) Co. P. C. p. 24.* because

cause it is done within the realm, and so may be tried in *Wales*.

33 *H. 8. cap. 20.* Concerning the proceeding touching the enquiry and trial of treason committed by persons, that become lunatic after the treason committed, without putting them to answer, and touching the execution of persons attainted of treason, and afterwards becoming lunatic, is repealed by the statute of 1 & 2 *P. & M. cap. 10.* *vide Co. P. C. p. 4 & 6.* both as to the indictment and as to the trial; but the forfeiture of persons attainted of treason, as to old treasons, stands in force.

33 *H. 8. cap. 23.* Treason or misprision of treason or murder committed by a person examined before three of the council, and found by them guilty, or suspected, may be enquired of, heard and determined before commissioners of *oyer and terminer* in any county of *England* to be named by the king, by jurors of the county in such commission: challenge for lack of forty shillings freehold allowed, peremptory challenge is ousted in treason or misprision of treason; trial by peers is saved.

This statute as to the indictment and trial of treason in any foreign county stands repealed by 1 & 2 *P. & M. cap. 10.* as was ruled by all the judges of *England* in *Somerville's case*, *M. 26 Eliz.* reported by justice *Clench*, *n. 17. (n)* against the opinion of *Stamford*, *Pl. Cor. Lib. II. cap. 26.* both as to the indictment and also as to the trial; for *Somerville* was indicted in the county where the offense was, and by a commission in *Middlesex* was tried by a jury of the county, where the offense was committed; but as to murder it seems to stand unrepealed and accordingly put in ure; *Crompton's justice. (o)*

35 *H. 8. cap. 2.* Treasons, misprisions and concealments of treasons committed out of the realm shall be heard and determined by the court of king's bench, and tried by a jury of that county, where the court sits, or before commissioners and in such shire, where the king shall appoint by his commission, by good and lawful men of the same shire, as if committed

(n) This is reported 1 *And. p. 104.*

(o) *p. 22. lord Grevil's case.*

committed in the same shire: trial of a nobleman by his peers is saved.

Upon this statute these points have been resolved: 1. That this act is not repealed by 1 E. 6. or 1 & 2 P. & M. cap. 10. thus it was resolved in *Orurk's case*, Co. P. C. p. 24. 2. It extends to a treason committed in *Ireland*, resolved in Sir *John Perrot's case* (p), Co. P. C. p. 11. 3. It extends to a treason committed in *Ireland* by a peer of *Ireland*, so resolved in 22 Car. 1. in B. R. in *Macguire's case* (q). 4. The commission in this act mentiond may be signed by the king's sign manual, or the warrant to the chancellor to issue the commission may be signed by the king's sign manual, and either of them is warranted by this statute, so resolved H. 36 Eliz. cited Co. Pl. Cor. p. 11. in the case of *Patrick Ocullen*. 5. If an indictment be taken by virtue of this statute in the county of *Middlesex*, and then the bench is removed by adjournment into another county, if the prisoner pleads not guilty, it shall be tried by a jury of that county, where the indictment is taken, because the words are, *that it shall be inquired, heard and determined by good and lawful men of the same county, where the said bench shall sit*. M. 35 & 36 Eliz. B. R. in the case of *Francis Dacres* cited Co. Pl. Cor. p. 34. but otherwise upon an indictment upon the statute of 5 Eliz. cap. 1. for refusing the oath of supremacy. Co. Pl. Cor. *ibidem*. (r)

III. As touching the *third* point of forfeitures by treason I shall say little more, than what is said before in the preceding chapter concerning the forfeiture of tenant in tail.

Only it seems, that the law was taken upon the statutes of 33 and 36 H. 8. before mentiond, that if an abbot or a bishop were attainted of treason, that by force of the general words of *forfeiting all their lands, tenements and hereditaments* they forfeit the lands of their church, tho they had them in *autre droit*.

1. Because in the savings of these statutes, yea and in all the new statutes of treason made in the time of *Henry VIII.* abovementiond the saving runs, *saving to all persons other than*
I
the

(p) *State Tr.* Vol. I. p. 181.

(q) *State Tr.* Vol. I. p. 928.

(r) The case of *Edmund Bonner* Bishop of *London*.

the offenders, their heirs and successors such right, &c. and the exception of *successors* makes it probable, that they intended, when a sole corporation was attainted of treason, he should forfeit the lands of his church:

2. Because in the act of attainder of the archbishop of *Canterbury* 1 *Mar. cap. 16.* there is a special proviso, that it should not extend to the lands which he had in right of his archbishoprick; but that these should be saved, as if he had not been attainted.

3. Because by the act of 3 1 *H. 8. cap. 13.* it appears plainly, that the possessions of monasteries, where the abbots were attainted of treason, came thereby to the crown, tho' they are not annexed to the court of augmentations of the king's revenues.

4. It is clearly admitted by the judges in the case of the bishop of *Durham*, *Dy. 289.* that by force of the statute of 26 *H. 8.* the lands of abbeyes, &c. came to the crown by the attainder of treason of the abbots, &c. and possibly it was in design at the time of the making of that statute.

But it is true, that before that statute of 26 *H. 8.* 1. The lands, which a person had in right of his church, were not forfeited by attainder of treason. 2. That altho' the lands of a sole corporation, such as were an abbot, prior, bishop, might be forfeited by attainder by the special penning of 26 and 33 *H. 8.* yet the lands of an aggregate corporation, as dean and chapter, mayor and commonalty, were not forfeited by the treason of the dean, or mayor, by virtue of those statutes, for the right of the land was in the commonalty and chapter, as well as in the dean or mayor, and not in them alone. 3. That at this day the attainder of treason doth not forfeit the lands of a bishop, parson or other sole ecclesiastical corporation: 1. Because the statutes of 1 *Eliz. (f)*, and 13 *Eliz. cap. 10. (t)*, disabling bishops, masters of hospitals, &c. to alien their possessions, disable them to forfeit as well as alien, or otherwise the statute would be illusory. 2. By the special penning of the statutes of 1 *E. 6. cap. 12.* and 1 *Mar.* whereby

4 D it

(f) This is not among the printed statutes.

(t) This statute made perpetual by 3 *Car. 1. cap. 4.*

it is enacted, that no penalties shall be inflicted for treason, other than such as be by 25 E. 3.

Concerning the forfeiture of lands in a county palatine by the attainder of treason out of a county palatine, or *e converso*.

By the statutes of 9 H. 5. cap. 2. 18 H. 6. cap. 13. 20 H. 6. cap. 2. 31 H. 6. cap. 6. outlawries of treason, &c. in the county palatine of *Lancaster* were not to cause a disability of the person outlawed, nor induce any forfeiture of the lands or goods of the party outlawed lying out of that county; but by the statute of 33 H. 6. cap. 2. these acts are repealed, and it is ordained, that the indicters in a county palatine (where the indictment supposes any person to be inhabiting out of the county of *Lancaster* within some other county of the realm) have lands to the yearly value of five pounds in that county, and that upon indictment to be taken out of the county palatine of persons residing there, the indicters shall have a yearly freehold of five pounds, and that no process be made out upon any such indictments, till it has been examined by the king's justices, whether the indicters be so qualified.

But now by the statute of 27 H. 8. cap. 24. all powers in county palatines for making of justices in eyre, of assize, of peace, of gaol-delivery, are resumed, and such commissions are to pass under the great seal of *England*, only in *Lancaster* they are to be under the usual seal of *Lancaster*: all processes to be in the king's name under the *teste* of him, that hath the county palatine; all indictments, &c. are to conclude *contra pacem regis*, and all fines and amerciaments upon officers are resumed; so that now all process of outlawry, attainder, &c. in county palatines are of the same effect and induce the same forfeitures, as if the offenses were committed, tried and determined in any other county of *England*.

But this alters not the title of the bishop of *Durham* or any other, that had royal forfeitures of treasons of lands within their liberty, or county palatine, for that is a distinct franchise, and not at all touched by the act of resumption, as appears by the case in *Dyer* (u) before cited, and by what is said

in the precedent chapter touching forfeitures by treason : and thus far for acts touching treason in the time of *Henry VIII.*

As touching treasons in the verge I shall particularly mention the same hereafter.

I come now to the time of king *Edward VI.*

1 *E. 6. cap. 12.* There are these several changes made by these several clauses.

1. It is enacted, that no act, deed or offense being by statute made treason or petit treason by words, writing, cyphering, deeds or otherwise whatsoever, shall be deemed or adjudged high treason or petit treason, but only such as be treasons or petit treasons in or by the statute of 25 *E. 3.* for declaring treason, and such offenses, as hereafter by this act are expressed and declared to be treason or petit treason ; and no other penalties to be inflicted upon the offenders in treason or petit treason, but what are ordained by that, or this statute.

2d clause repeals the statutes concerning heretics, *Lollards*, the six articles, selling of books of the scriptures, &c. ordained in the time of *R. 2. H. 5.* and *H. 8.*

3d clause repeals all felonies made by act of parliament, since 23 *April 1 H. 8.* that were not felonies before, and all penalties touching the same.

4th clause repeals the act of 31 *H. 8.* touching obedience to the king's proclamations, and the statute of 34 *H. 8.* imposing penalties upon the disobedient.

5th clause enacts certain new offenses, *viz.* “ If any shall
“ by preaching, express words or sayings affirm and set forth,
“ that the king, his heirs or successors, kings of this realm,
“ is not or ought not to be supreme head on earth of the
“ church of *England* and *Ireland* immediately under God, or
“ that the bishop of *Rome*, or any besides the king for the
“ time being, ought by the laws of God to be supreme head
“ of the same churches, or that the king, his heirs or suc-
“ cessors, kings of this realm, ought not to be king of *Eng-*
“ *land, France* and *Ireland*, or any of them, or do compass
“ by open preaching, express words or sayings to depose or
“ deprive the king, his heirs or successors kings of this realm,
“ from his royal estate or titles to the same kingdoms, or
“ do

“ do openly publish, or say by express words or sayings, that
 “ any person, other than the king, his heirs or successors
 “ kings of this realm, of right ought to be king of the realms
 “ aforesaid, or any of them, or to have or enjoy the same or
 “ any of them, the offenders, their counsellors, aiders, abettors,
 “ procurers and comforters, for the first offense shall lose his
 “ goods, and suffer imprisonment during the king’s pleasure;
 “ and if after such conviction he shall commit the same of-
 “ fense again, other than such as be expressed in the statute
 “ of 25 E. 3. he shall forfeit to the king the profits of his
 “ lands, benefices, and ecclesiastical promotions during his
 “ life, and all his goods, and suffer perpetual imprisonment;
 “ and for the third offense after a second conviction, he shall
 “ be guilty of treason, and suffer and forfeit as a traitor.

6th clause enacts that, “ If any person shall by writing,
 “ printing, overt-act or deed, affirm or set forth, that the
 “ king of this realm for the time being, is not or ought not
 “ to be supreme head on earth of the churches of *England*
 “ and *Ireland*, or any of them immediately under God, or
 “ that the bishop of *Rome* or any person, other than the
 “ king of *England* for the time being, is or ought to be su-
 “ preme head on earth of the same churches or any of them,
 “ or do compass or imagine by writing, printing, overt-deed
 “ or act to depose or deprive the king, his heirs or successors
 “ from their royal estate or titles of king of *England*, *France*
 “ and *Ireland*, or any of them, or by writing, printing,
 “ overt-act or deed, do affirm, that any person, other than
 “ the king, his heirs and successors, of right ought to be
 “ king of the realms of *England*, *France* and *Ireland*, or any
 “ of them, then every such offender shall be guilty of treason,
 “ and suffer and forfeit, as in case of high treason.

7th clause enacts, “ That this act shall not extend to re-
 “ peal any statutes touching the counterfeiting, clipping, fi-
 “ ling or washing the coin current of this kingdom, or im-
 “ porting counterfeit coin, or counterfeiting the king’s sign
 “ manual, privy seal, or privy signet, their abettors, &c.

8th clause enacts, “ That if the persons declared by the
 “ act of 35 H. 2. to be inheritable to the crown do usurp

“ one upon the other, or interrupt the king’s possession of
“ the crown, they, their abettors, &c. shall be traitors.

9th clause takes away clergy from persons found guilty by verdict, confession, or not directly answering, or standing mute in cases of murder of malice prepense, of wilful poisoning, house-breaking, any person being in the house and put in fear, robbing in or near the highway, horse-stealing, sacrilege; but in all other cases of felony clergy allowed, and sanctuary the same as before the 24 April 1 H. 8.

10th clause provides, that all the statutes of H. 8. concerning challenge, or concerning trial of foreign pleas, shall stand in force.

11th clause declares, that no person already arrested or imprisoned, indicted or convicted, or outlawed for treason, petty treason or misprision of treason, shall have any advantage of this act.

12th clause provides, that wilful killing by poison shall be deemed wilful murder, and the offenders, their aiders, abettors, counsellors or procurers shall suffer, as murderers.

13th clause enacts, that a lord of parliament in all cases within the benefit of clergy, tho he cannot read, yet shall be delivered as a clerk convicted without burning in the hand, or loss of lands, &c.

14th clause saves the trial by peers for any offenses within this statute.

15th clause enacts, that clergy be allowed, notwithstanding the offender have been married to a single woman or widow, or to two wives or more.

16th clause enacts, that notwithstanding attainder of treason, petit treason, misprision of treason, murder or felony, the wife shall have her dower, and saves to all and every person, other than to the offender attainted, convicted or outlawed, all such right, title, interest, entry, leases, possession, condition, profit, commodity, and hereditaments, as they had before or at the time of the attainder, conviction, or outlawry.

17th clause provides, that the statute of 27 H. 8. for felony in servants stealing the goods of their masters, shall stand in force.

18th clause provides, that no person be put to answer for any of the offenses abovesaid concerning treason by preaching or words only, unless accused before one of the king's council, justice of assise or peace, &c. within thirty days after the offense committed.

19th clause, concealing and keeping secret any high treason shall be misprision of treason, and the offender shall forfeit as heretofore hath been used in case of misprision of treason.

20th clause, calling, writing or printing the *French* king king of *France* shall not be adjudged any offense within this act.

21st clause provides, that no person shall be indicted, arraigned, condemned or convicted for any offense of treason, petit treason, misprision of treason, or for any words before mentioend, whereby he shall suffer pains of death, loss of goods, imprisonment, &c. unless the offender be accused by two sufficient and lawful witnesses, or shall willingly without violence confess the same.

I have mentioend the clauses of this statute at large, and by their numbers, because there be many things observable thereupon.

By the first clause of this statute all those numerous treasons and petit treasons, that were enacted or declared at any time since 25 E. 3. are wholly taken away, except that of counterfeiting, clipping, washing, or filing of coin, &c. excepted in the 7th clause; but this doth not mention misprisions of treason, but only declares what misprision of treason is, for by taking away the treasons themselves, the misprisions of those treasons must needs cease, as a crime.

But this act did not extend to alter the trials in case of treason, and therefore notwithstanding this act the statute of 28 H. 8. cap. 15. for treasons at sea, 26 H. 8. cap. 6. for counterfeiting, &c. in *Wales*, 32 H. 8. cap. 4. for treasons in *Wales*, 33 H. 8. cap. 23. for treasons to be tried out of their county, 35 H. 8. cap. 2. for trial of forein treasons, stood yet in their force, until the statute of 1 & 2 P. & M. cap. 10.

Again, notwithstanding that by some former statutes certain offenses, which were felony before, as wilful burning of
houses

houses and poisoning, were made treason, yet the repeal of those acts that made them treason leaves them nevertheless in the state, wherein they before were, namely felony.

Again, upon consideration and comparison of the 5th and 6th clauses these things are observable, namely, 1. The wisdom of the law-makers, that put the very same offenses in words spoken in a lower rank of punishment than the same things written or printed, making the former but a misdemeanor in the first offense, which in printing or writing was treason in the first offense. 2. It is observable upon that fifth clause, that there were some things within the fifth clause, that might be treason or an overt-act of treason within the statute of 25 E. 3. (*other than such as be expressed in the statute of 25 E. 3.*) *vide quæ supra dicta sunt cap. 13.* touching the treason in compassing the king's death.

It is also observable upon the 11th clause, that when an offense is made treason or felony by an act of parliament, and then those acts are repealed, the offenses committed before such repeal and the proceedings thereupon are discharged by such repeal, and cannot be proceeded upon after such repeal, unless a special clause in the act of repeal be made enabling such proceeding after the repeal for offenses committed before the repeal, as there is in this case.

3 *Ed. 6. cap. 5.* Tho it primarily concerns riots, yet consequently it concerns treason also: thereby it is enacted,

1. " That if any persons to the number of twelve or more
" assembled together shall intend, go about, practise or put
" in ure with force of arms unlawfully, and of their own
" authority to kill, take or imprison any of the king's privy
" council, or unlawfully to alter or change any laws esta-
" blished by parliament for religion, or any other laws or
" statutes of this realm, and being commanded by the she-
" riff, justice of peace, mayor, &c. by proclamation in the
" king's name to repair to their houses, if they shall conti-
" nue together by the space of one whole hour after such
" proclamation, or after that shall willingly in forcible and
" riotous manner attempt to do or put in ure any of the
" things aforesaid; this shall be adjudged treason in all the of-
" fenders,

“ fenders, their aiders, abettors and procurers.” See before in chapter XIV. concerning levying of war, how much of this high treason is within the statute of 25 E. 3.

2. “ That if any persons to the number of twelve or more shall intend, go about, practise or put in ure in manner aforesaid to overthrow, cut, break or dig up pales, hedges, ditches or other inclosure of any park, inclosed grounds, banks of pools or fish-ponds, conduits, conduit-heads or pipes to the same, which may remain open, or unlawfully to have common or way in the said park or grounds, or to destroy the deer, warrens of conies, dove-houses, fish, or to pull down houses, mills, bays or barns, or to burn stacks of corn or grain, or to diminish the rents or yearly values of any manors, lands, &c. or the price of any victuals, corn or grain, or any other thing usual for the sustenance of man, and being required, as before, shall not depart, but continue an whole hour, or shall after that forcibly attempt to do or put in ure the things aforesaid, they shall be adjudged felons without benefit of clergy.

Vide supra cap. 14. which of these offenses were a levying of war against the king.

3. “ That if any person unlawfully and without authority by ringing of bells, founding of drums, trumpet, horn, or other instrument, by firing of beacons, by malicious uttering of words, casting of bills or writings, or by any act whatsoever raise or cause to be assembled any persons to the number of twelve, or above, to the intent that they shall do any of the acts aforesaid, who shall not dissolve their assembly upon such proclamation within an hour, or shall commit any of the said acts, then they, that raise such assemblies, shall suffer as felons.

4. If such assemblies to the number of forty, and above, shall continue together two hours, or shall bring weapons, meat, &c. to the persons so assembled, it shall be high treason.

5. If above the number of two and under twelve attempt such things, &c. as aforesaid, they are to suffer imprisonment for a year, and make fine and ransom, with treble damages to persons damnified.

6. In the cases of treason within this act tenant in tail is to forfeit to the king during life only, and tenant in fee-simple to forfeit only as upon attainder of felony.

7. Power is given to the sheriffs, justices, mayor, &c. to raise power, and array them in manner of war against the rioters, to the intent to apprehend the rioters; and if the said rioters do not depart upon proclamation but continue together, it shall be lawful for the sheriff, &c. after such commands to kill the rioters; if after such commandment it fortune any of the rioters be killed upon such account, the sheriff, &c. or any assembled by him shall thereof be discharged: then follows the punishment of those, who refuse to assist the sheriff, or justice in the repression of riots.

Movers to such riots are guilty of felony without clergy, and persons solicited thereunto not revealing it to suffer three months imprisonment.

This act being made in a great measure for the support of the reformed religion under *Edward VI.* was as to all points of treason therein contained repealed by 1 *Mar. cap. 1.* but in effect the very same offenses were enacted felonies within clergy by 1 *Mar. sess. 2. cap. 12.* which was to continue to the end of the next parliament, and after the death of queen *Mary* was re-enacted by 1 *Eliz. cap. 16.* to continue during her life, and till the end of the next session after her death, but then expired.

That which I would observe upon this act is this, how careful they were in this time not to be over-hasty in introducing constructive treasons, and to shew how the opinions of the parliaments of *Edward VI.* queen *Mary,* queen *Elizabeth* went, as to the point of constructive treason, and how careful they were not to go far in extending the statute of 25 *E. 3.* beyond the letter thereof.

As to the point of indemnifying those, that killed the rioters in assistance of the sheriff, it is true, that the killing of rioters barely for continuing together after proclamation required a new law to indemnify it, as in the statute is provided; but if rioters resist the sheriff in his endeavour to apprehend them, or make head against him, or continue to put

in ure their riotous acting, as pulling down houses, inclosures, &c. if the sheriff, or those that come in aid of him, kill any of them, the law and the statute of 2 H. 5. cap. 8. do indemnify them, as shall be hereafter more fully declared.

By 5 & 6 E. 6. cap. 11. “ If any person by open preaching, exprefs words or sayings do exprefly, directly and advisedly fet forth and affirm, that the king, that now is, is an heretic, schismatic, tyrant, infidel, or usurper of the crown, or that any his heirs or successors, to whom the crown is to come by the statute of 35 H. 8. being in lawful possession of the crown, is an heretic, schismatic, tyrant, infidel, or usurper of the crown, then such person, his aiders, abettors, procurers, counsellors, and comforters knowing the same, shall for the first offense lose their goods and be imprisoned at the king’s will, for the second offense after conviction for the first lose the profits of their lands and ecclesiastical benefices during their lives, and be perpetually imprisoned, and for the third offense after the second conviction be adjudged traitors, and lose their lives, and forfeit as in case of high treason.

“ If any person shall by writing, printing, painting, carving or graving, directly, exprefly and advisedly publish, fet forth and affirm, that the king, or any his heirs or successors, &c. is an heretic, schismatic, tyrant, infidel, or usurper, it shall be high treason, and he shall forfeit as in case of high treason.

“ If any person or persons rebelliously detain the king’s castles, or fortresses, ships, ordinance, artillery, or fortifications, and do not render them up to the king, his heirs or successors within six days after proclamation under the great seal, it shall be treason, and the offender, his aiders, &c. knowing of the said offenses shall suffer and forfeit as in case of high treason.

“ If any the king’s subjects commit treason contrary to this act or any other act in force out of the realm, it shall be inquired and presented by twelve men of any county, which the king by commission shall assign, as if committed within the realm, and the like process thereupon, as if done within

“ the realm, and the outlawry against an offender inhabiting
“ out of the realm shall be as effectual as if he had been re-
“ sident within the realm.

“ But if he render himself upon the outlawry within a
“ year, he shall be received to traverse the indictment. (x)

“ Persons attainted of any treason shall forfeit to the king
“ all their lands of any estate of inheritance in their own right
“ at the time of the treason committed, or at any time after.

“ No proceeding shall be on any the offenses aforesaid
“ committed only by preaching or words, unless the offender
“ be accused thereof within three months before one of the
“ king’s council, justice of assise, justice of peace being of the
“ *quorum*, or two justices of peace in the shire, where the
“ offense is committed: concealment of any high treason
“ shall be adjudged only misprision of treason, and the offen-
“ der to forfeit as in misprision of treason.

“ Provided that no person shall be indicted, arraigned,
“ condemned, convicted or attainted for any of the treasons
“ or offenses aforesaid, or for any other treasons, that now
“ be, or hereafter shall be, which shall be hereafter perpe-
“ trated, committed, or done, unless the same offender or
“ offenders be thereof accused by two lawful accusers, which
“ said accusers at the time of the arraignment of the party
“ accused, if they be living, shall be brought in person be-
“ fore the party so accused, and avow and maintain that,
“ which they have to say against the said party to prove him
“ guilty of the treasons or offenses contained in the bill of
“ indictment laid against the party arraigned, unless the party
“ arraigned shall willingly without violence confess the same:
“ a saving of the right of all, other than the offenders and
“ their heirs, or such as claim to their or any of their use:
“ the wife of the party attainted of these or any other trea-
“ sons

(x) This clause remains, as our author observes below, unrepealed to this day, so that it was great injustice to deny the benefit of a trial within the year to Sir *Thomas Armstrong*, who was outlawed, while he was beyond sea, 36 *Car. 2.* and of this opinion was the house of commons by their vote *Nov. 19. 1689.* when it was resolved, that Sir *Thomas*

Armstrong's plea ought to have been admitted according to the statute of 5 & 6 *E. 6.* see *State Tr. Vol. III. p. 896.* and accordingly the like plea was allowed to *Johnson*, who was indicted for counterfeiting the coin, *Mich. 2 Geo 2. B. R.* altho he had broke prison, and was retaken in *England.*

“ sons shall be barred of dower of the lands of the party
 “ attainted, so long as the attainder stand in force.

Upon this statute many things are observable, 1. That it should seem, that neither the writing of these scandalous words, nor the bare detaining of the king's forts or ships were treason within the statute of 25 E. 3. for if they had been such, this act would not have been made. 2. The *second* thing observable is the great discrimination, which in this act is made between words and writing, the latter being made treason, the former only misdemeanor in the two first offenses, altho the words be the same in both. 3. That so much of this act, as is introductive of new treason, is repealed by the statute of 1 Mar. cap. 1. but whether those two penalties previous to treason in case of words, *viz.* for the first and second offense, be repealed by any statute, seems doubtful, for those are not treason. 4. But those clauses in this statute, that concern trial of foreign treasons, concerning outlawry of persons beyond the sea, forfeiture of lands of inheritance of the party attainted, loss of dower by the wife of the party attainted, stand unrepealed to this day; and so it is held by many, that the clause concerning two accusers stands still on foot; *de quo vide postea.*

Touching the clause for the forfeiture of the lands of the party attainted there are these things considerable.

1. That by this clause tenant in tail of the gift of the king doth by his attainder forfeit his estate-tail, notwithstanding the statute of 34 H. 8. cap. 20. for as that statute coming after 26 & 33 H. 8. did as to that case repeal so much of those acts; so this statute of 5 & 6 E. 6. coming after 34 H. 8. doth repeal that statute, as to the case of attainder of treason of such donee in tail.

2. That this act varies much from the penning of the acts of 26 and 33 H. 8. for they seemed, as hath been observed, to fasten upon lands in right of a corporation sole, as bishop, abbot, &c. but this limits it only to lands in their own right, which possibly, tho an affirmative clause, may correct the extent of the statutes of 26 and 33 H. 8. and bind up the forfeiture to lands only in their own right.

As to the point concerning the two lawful accusers these things will be considerable, 1. Whether it extend in law to new treasons made after this act. 2. Whether by any statute this be repeald. 3. Admitting it be not, what shall be said two lawful accusers. 4. What a confession.

I. The statute of 5 & 6 E. 6. above-mentiond appoints two lawful accusers in case of all treason enacted or to be enacted; therefore if a new treason were made by a subsequent act of parliament without any clause, that directs the indictment or trial in any other manner than is appointed by 5 & 6 E. 6. by the words of this act there must be two lawful accusers, both upon the trial and indictment.

But there have been great opinions, that tho the words of 5 & 6 E. 6. extend to treasons, that shall be hereafter enacted, yet this clause doth not extend in law to such new treasons, unless special provision be made for the same in the act making such new treason: others have been of a contrary opinion, because it only concerns the manner of proceeding, which may be directed by a precedent act, as upon the statute of 18 Eliz. cap. 5. 21 Jac. cap. 4.

II. But certainly, if there be by a subsequent statute any derogatory clause from this statute, then there need not be two lawful accusers.

Therefore upon the statute of 1 & 2 P. & M. cap. 11. in treason for counterfeiting the coin current here, or for clipping and impairing of coin (which was then conceived a treason not repeald by 1 Mar. cap. 1.) the evidence and course of proceeding at common law both upon the indictment and trial are restored, and so no necessity of two witnesses; this is agreed on all hands. *Co. Pl. Cor.* p. 25.

Again, tho the treason for clipping or washing of coin declared by 3 H. 5. cap. 6. were repeald by the statute of 1 Mar. cap. 1. as is declared by the preamble of the statutes of 5 Eliz. cap. 11. and 18 Eliz. cap. 1. and that the same is newly made treason by the statutes of 5 and 18 Eliz. and consequently, were there no more in the case, two witnesses might be requisite by the words of the act of 5 & 6 Ed. 6. because those are newly made treasons, yet by the penning of those sta-

tutes of 5 and 18 *Eliz.* it is not necessary, because the words in both statutes are *being lawfully convicted or attainted according to the order and course of the law*, which takes in the whole proceeding, as well indictment as trial; for the course of law therein mentiond seems to be intended the common law, and at common law there was no necessity of two witnesses in any case of treason.

And altho the statute of 1 & 2 *P. & M. cap. 11.* did take clipping and washing to be continuing treasons, and therein might mistake, yet there being an exprefs clause in that statute, that in those cases the evidences at common law should be restored; this direction might take off the statutes of 1 and 5 *E. 6.* as to the two witnesses in those cases, and so have an influence upon the statutes of 5 and 18 *Eliz.* or at least may go far in expounding them to restore the evidence required at common law in those cases.

But whether as to all other treasons the general clause in the statute of 1 & 2 *P. & M. cap. 10.* *that all trials hereafter to be awarded or made for any treason shall be had and used only according to the due order and course of the common laws of this realm and not otherwise*, have taken away the necessity of two witnesses upon the indictment, hath been controverted (y), for on all hands it is agreed, that it takes away the necessity of two witnesses upon the trial, if there were no more in the case.

My lord *Coke* in *Pla. Cor. p. 25, 26.* delivers his opinion, that two witnesses are necessary upon the indictment in case of all treasons, other than those, that are for counterfeiting, clipping, or impairing the coin, and gives many weighty reasons for it, and cites a resolution in 14 *Eliz.* lord *Lumley's* case, and 4 *Mar. Bro. Corone, 219.* for according to him the indictment is a distinct thing from the trial; therefore the statute of 1 & 2 *P. & M. cap. 10.* extending only to the trial doth not take away the necessity of two witnesses upon the indictment, and accordingly the general opinion hath run thus since. (z)

3

But

(y) See *Kel. 9, 18, 49.*(z) *State Tr. Vol. III. p. 56.* the case of lord *Castlemain, Ibid. p. 415.* earl of *Shaftsbury's* case; *p. 645.* lord *Rufel's* case; *p. 733.* colonel *Sidney's* case.

But yet much is to be alleged, that the statute of 1 & 2 P. & M. cap. 10. extends as well to reduce the indictment, as the trial, to the course of the common law.

1. Because it seems to be the intent of the statute to involve the indictment under the general appellation of the trial, according to 2 & 3 P. & M. Dy. 132. a. and tho it is true, that P. 1 Mar. Dy. 99, 100. in *Thomas's* case there were two accusers required, yet that was before the statute of 1 & 2 P. & M. cap. 10.

2. Because this statute of 1 & 2 P. & M. cap. 10. in other cases extends as well to the indictment, as the trial; it is agreed, that the statute of 33 H. 8. cap. 23. concerning trial of treason in a forein county, is wholly repeald by 1 & 2 P. & M. cap. 10. *quod vide* Co. P. C. p. 27. Dy. 132. whereas, if it should only refer to the trial, the indictment might still be in a forein county, and so he might be indicted in a forein county, and yet must be tried in the proper county: *vide* accordingly resolved H. 12 Eliz. Dy. 286. b. touching the rebels in the *North*, where *Stamford's* opinion, Lib. II. cap. 26. (a) is denied by all the judges of both benches; again, the statute of 33 H. 8. cap. 20. touching the indictment and trial of lunatics in any county the king shall appoint, is repeald by this act of 1 & 2 P. & M. cap. 10. as well to the indictment as the trial: *vide* *Andersf. Rep. n. 154. Arden's case.* (b)

3. The indictment is in common speech a part of the trial, or at least a necessary incident to it; and if it should be necessary to have two witnesses to the indictment, it would consequently be necessary to have them upon the trial also; for by the statute of 5 & 6 E. 6. cap. 11. the two witnesses, that are upon the indictment, must avow their testimony in the presence of the party upon his arraignment: and it seems incongruous, that a greater evidence should be required to the indictment, which is only an accusation, than to the trial (c), where the party is to be convicted; therefore, if the statute of 1 & 2 P. & M. intended to take it away upon the trial, it cannot

(a) S. P. C. p. 90.

(b) 1 And. 105.

(c) Lord Coke P. C. p. 25. says the greatest proof is most of all necessary at

the time of the indictment, because that is the foundation of all the rest, and is commonly found in the absence of the party accused.

cannot be supposed to continue the necessity of two witnesses upon the indictment.

4. There is also a great authority for this opinion: *vide* the resolution and reason of the judges in *Arden's case*, *Anderf. Rep. n. 154. (d)*, where they resolved, that they could not be indicted in a foreign county upon the statute of 33 *H. 8. cap. 23.* because the statute of 1 & 2 *P. & M. cap. 10.* restoreth the common law as well in relation to the indictment as the trial, and the trial includes the indictment; and this was by all the justices and barons so resolved, which case is also reported by justice *Clench, n. 17.* to be 19 *Novem. 26 Eliz.* Again *ibidem n. 28.* “ Fuit tenus per les justices, que ou le statute de *E. 6.* est, que inditement de treson sera per 2 testes, “ & le statute de reine *Mary* est, que tresons sey try solonc “ le common ley, que ore inditements sey solonc le common “ ley, car inditement est parcel de tryal, car nul tryal poet “ estre sans inditement, & sic fuit in *Somerville's & Arden's* “ case.

5. It hath been the care of the parliaments since in their acts to make provision for two witnesses in cases of treasons newly made, *vide* statutes 13 *Eliz. cap. 1.* 13 *Car. 2. cap. 1.* so that it was thought, that the statute of 5 & 6 *E. 6.* was not of force as to the two witnesses, at least as to treasons newly enacted, otherwise in cases of new treasons they needed not these provisions. (*e*)

And thus the reasons stand on both sides, and tho these seem to be stronger, than the former, yet in a case of this moment it is safest to hold that in practice, which hath least doubt and danger; *quod dubitas, nè feceris*, especially in cases of life (*f*); but upon misprision of treason two witnesses are requisite both upon the indictment and trial. *Co. Pla. Cor. p. 24.*

3

2. The

(*d*) 1 *And. 107.*

(*e*) If it were only questionable, that was reason sufficient for making such provision. *Vide supra p. 261.*

(*f*) However since our author wrote this matter is in great measure settled by 7 *W. 3. cap. 3.* whereby it is enacted, “ That in all cases of high treason, “ whereby any corruption of blood, &c.

“ no person shall be indicted, tried or “ attainted, but upon the oaths of two “ lawful witnesses to the same treason; “ but out of this act are excepted all “ proceedings in parliament, or proceed- “ ings for counterfeiting the king's coin, “ great seal, privy seal, or signet or sign “ manual.

III. The third thing considerable in this clause is, what shall be said *two lawful accusers* within this statute, if it be of force.

As to the accusers mentiond in the statute of 5 & 6 E. 6. cap. 11. they are no other than the two lawful and sufficient witnesses mentiond in the statute of 1 E. 6. cap. 12. *in fine*; this is agreed by my lord *Coke*, *Pl. Cor.* p. 25.

Now what are lawful witnesses in this case is considerable; the lawfulness of witnesses must respect either, 1. The persons, or else, 2. The testimony of the witnesses.

1. As in relation to the persons of witnesses, those are said lawful witnesses, which by the laws of *England* are allowed to be witnesses.

A *feme covert* is not a lawful witness against her husband (*g*) in case of treason, yet in lord *Castlehaven's* case (*b*) upon an indictment for a rape upon his lady by another by her husband's present force, she was received as a witness by the advice of the judges, that assisted at that trial, and upon her evidence he was convicted and executed.

But a woman is not bound to be sworn or to give evidence against another in case of theft, &c. if her husband be concerned, tho it be material against another, and not directly against her husband. *Dalt. cap.* 111. (*i*)

Upon an indictment upon the statute of 3 H. 7. cap. 2. for taking away forceably and marrying a woman, the woman so married may be sworn against her husband, that so marries her, if the force were continuing upon her till the marriage; and thus it was done in the case of the lady *Fulwood*, *M.* 13 *Car.* 1. *B. R. Croke* (*k*), and accordingly *seriatim* resolved by all the judges of the king's bench lately in the case of *Brown*, *Trin.* 25 *Car.* 2. (*l*) for these reasons: 1. Because otherwise the statute would be vain and useles, for possibly all that were present were of the offender's confederacy. 2. The marriage, tho a marriage *de facto*, yet, if it were effected by a continued act of force,

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was

(g) *Co. Lit.* 6. b.

(b) *Hut.* 115. *Russb. Collect.* Vol. II. *Swendsen, Mich.* 1 *Ann. B. R. State Tr.* Vol. V. p. 453.

f. 93--101: *State Tr.* Vol. I. p. 366.

(i) *N. Tidit. cap.* 164. p. 540.

(l) 1 *Ven.* 243. 3 *Keb.* 193.

(k) *Cro. Car.* 482, 484, 488, 492. the

was not a marriage *de jure*, for it was dissoluble by divorce, unless ratified by a subsequent free cohabitation or consent. But 3dly and principally, because it was *flagrante crimine*, for the child was taken away upon the *Thursday*, married the *Friday*, and seized by the guardian the next day, before they had lain together, and the force was all that while continuing upon her. 4. There were other witnesses, that proved the first taking away by force against the child's will, tho there were no witnesses to prove the marriage forceable but herself, who expressly swore, that she was married against her will; upon all which circumstances it was ruled, that she should be examined in evidence, and the credibility of her testimony left to the jury; but most were of opinion, that had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband; he was convicted and had judgment of death, and was executed.

Regularly an infant under fourteen years is not to be examined upon his oath as a witness; but yet the condition of his person, as if he be intelligent, or the nature of the fact may allow an examination of one under that age (*m*), as in case of witchcraft an infant of nine years old has been allowed a witness against his own mother. *Dalton.* (*n*)

And the like may be in a rape of one under ten years upon the statute of 18 *Eliz. cap. 6.* and the like hath been done in case of buggery upon a boy upon the statute of 25 *H. 8. cap. 6.*

And surely in some cases one under the age of fourteen years, if otherwise of a competent discretion, may be a witness in case of treason: *vide que supra dixi p. 26.*

A man concerned in point of interest is not a lawful accuser or witness in many cases, the party to an usurious contract cannot be a witness to prove an usurious contract upon an information, if the money be not paid, for he swears to avoid his own debt or security (*o*); but if the money be paid he

(*m*) By the laws of *Ina* a child ten years old was allowed to be a witness in theft. *Vide LL. Inæ, l. 7.*

(*v*) *Dalt. Just. N. Edit. p. 546*

(*o*) *Co. Lit. 6. b.*

he may be a witness to prove it, where another informs, for he is to gain nothing.

And therefore if any man hath the promise of the goods or lands of the party attainted, he is no lawful witness to prove the treason.

A person outlawed in trespass is nevertheless a lawful witness, but no lawful juryman or indictor in case of felony or treason, Sir *William Withipol's* case. (p)

A father or son or adversary in a suit is a witness for or against a person accused of any crime, yet not always a competent juryman.

A *particeps criminis* is in some cases a lawful accuser within this statute, in some cases not.

An approver shall be sworn to his appeal, *Stamf. Pla. Cor.* (q); but it seems, that he shall not be a witness upon the trial, if the party accused put himself upon his country, because, if he fail in proving the party guilty, he shall be hanged.

In Sir *Percy Cresby's* case, P. 19 *Jac. Noye's Rep.* p. 154. *placito* 676. in *Camera Stellatâ*, if two defendants be charged for a crime, one shall not be examined against the other to convict him of an offense, unless the party examined confess himself guilty, and then he shall be admitted.

9 Dec. 15 Car. 2. at *Newgate*, *Henry Trew* was indicted of burglary, and by advice of *Keeling* chief justice, *Brown* justice, and *Wilde* recorder, *Perrin*, that was in gaol for two other robberies, and confessed himself to be in this burglary, was sworn as a witness against *Trew*, but he was not indicted of the burglaries or robberies. *Ex libro Bridgman.*

10 Dec. 1662. *Tonge, Philips*, and others (r) were indicted for treason for compassing the king's death, the question was, whether those, that were parties in the compassing, which were not yet pardoned, nor indicted, might be produced as witnesses, namely *Riggs* and others; and upon conference with all the judges these points were resolved.

1. That

(p) *Cro. Car.* 154, 147. *W. Jones* (r) *Kcel.* 17. *State Trials*, Vol. II. p. 488.

(q) *Lib. II. cap.* 56. p. 145. a.

1. That the party to the treason, that confessed it, may be one of the two accusers or witnesses in case of treason, for the statute intended two such witnesses, that were allowable witnesses at common law, and so may a *particeps criminis* be admitted as a witness, and was admitted to give evidence to the jury; but the jury may, as in other cases, consider of the evidence and credit of the witnesses, but he is sufficient to satisfy the statute.

2. That the confession before one of the privy council or a justice of the peace being voluntarily made without torture is sufficient as to the indictment or trial to satisfy the statute, and it is not necessary, that it be a confession in court; but the confession is sufficient, if made before him that hath power to take an examination.

3. The king having promised a pardon to *Riggs*, if he would discover the plot, he performed that part by his discovery; and this was held by all no impediment to his testimony, for the promise was not applied to witnessing against any other; but two justices (*f*) held, that if the king promised a pardon upon condition, that he would witness against any others, and that being acknowledged by *Riggs* when he took upon him to give evidence, &c. that will make him incapable to give evidence, because he swears for himself (*t*); but in this point the greater number were of a contrary opinion (*u*), *ex libro Bridgman verbatim*, and I remember the consultation and resolution accordingly.

And accordingly at the sessions of *Newgate* 1672. *Mary Price* was convicted of treason in clipping the current money of *England* by the testimony of those, that were *participes criminis* (*x*), namely *Throgmorton* and others, who brought her broad money upon allowance of 10*l.* *per Cent.* and carried off the clipt money into their master's cash.

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(*f*) These were our author and *J. Brown*.

(*t*) *Vide postea part. 2. cap. 27.*

(*u*) Of this contrary opinion was the court in the case of *Christopher Layer*, *Mich. 9 Geo. I. B. R. State Tr. Vol. VI. p. 259.*

(*x*) But it does not appear in this case, whether they were promised a pardon or not: the like resolution was in the case of *Joseph Clark* for coining 16 *Car. 2.* see *Kel. 33.* but in that case the witness had actually obtained a pardon.

The like conviction was in the same year of *Hyde* and others of robbery upon the highway by one, that was a party in the robbery, but not indicted.

But in these and the like cases 1. The party, that is the witness, is never indicted, because that doth much weaken and disparage his testimony, but possibly not wholly take away his testimony. 2. And yet, tho such a party be admissible, as a witness in law, yet the credibility of his testimony is to be left to the jury, and truly it would be hard to take away the life of any person upon such a witness, that swears to save his own, and yet confesseth himself guilty of so great a crime, unless there be also very considerable circumstances, which may give the greater credit to what he swears.

If *A. B.* and *C.* be indicted of perjury on three several indictments concerning the same matter, *A.* pleads not guilty, *B.* and *C.* may be examined as witnesses for *A.* for yet they stand unconvicted, altho they are indicted, 19. *Car.* 1. *B. R. Bilmore's case.*

By the statute of 1 & 2 *P. & M. cap.* 14. justices of peace ought to examine the party and take informations touching offenses brought before them, and certify them at the next gaol-delivery.

Tho justices of peace cannot hear and determine treason by virtue of their commission of the peace, no nor take an indictment of it, yet they may take examinations and informations touching such offense of the party brought before them, and certify them according to that statute; and those informations taken upon oath, as they ought to be, and sworn to by the justice or his clerk, that took them, to be truly taken, may be read in evidence against the prisoner, if the informant be dead, or not able to travel, and sworn so to be; yea by some opinion, if he were bound over and appear not, they may be read, which seems to be questionable.

And in such case information upon oath taken before justices of the peace of one county may be transmitted before justices of gaol-delivery of that county, where the offense was committed, *viz.* if the offender were brought be-

fore that justice; *quere tamen*, because the offense was out of his jurisdiction; yet *vide Dalt. cap. 111. p. 299. accordant. (y)*

He, that hath a remainder expectant upon an estate-tail, shall not be allowed as a witness, and so ruled, but a disseisor may be a witness to a deed made to the tenant. 12 *Aff. 12.*

Mich. 1652. A commission issued to examine the validity of a marriage supposed to be done by force, and upon that a divorce was had: an indictment was against *Wells*, that married the woman, the depositions in the cause of divorce were offered to prove the force, but rejected, because in a suit of another nature and jurisdiction, *Wells's* case.

A man convict of conspiracy, perjury, or forgery is not a lawful witness. *Crompt. de pace regis 127. b. Dalt. cap. 111. (z)* but if he be pardoned, it seems he may be a witness.

And thus far concerning the capacity or incapacity of the witnesses.

2. In relation to the manner of their testimony, the opinion in *Dyer* of a witness by hearsay 1 *Mar. Dy. 99. b.* was rejected by all the judges in the lord *Lumly's* case, *H. 14 Eliz. Co. Pla. Cor. 25.* but if it be a hearsay from the offender himself confessing the fact, such a testimony upon hearsay makes a good witness within the statute.

The information upon oath taken before a justice of peace may make a good testimony to be read against the offender in case of felony, where the witness is not able to travel, yet in case of treason, where two witnesses are required, such an examination is not allowable, for the statute requires, that they be produced upon the arraignment in the presence of the prisoner to the end that he may cross examine them.

And thus much concerning the statutes in the time of *Edward VI.* and evidence upon indictments, I shall only add this.

In civil actions, as trespass against *A. B.* and *C.* if no evidence be given against any one to prove him guilty, he may be
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(y) *N. Edit. cap. 164. p. 544.*

(z) *p. 542.*

examined on the part of the defendant, and stands as a competent witness; and I see no reason, why if two or three persons be indicted, and no evidence given against one or more of them, but that he may be a witness for the other; but otherwise it is, if there be but a colourable evidence against him. (*)

C H A P. XXV.

*Concerning treasons declared and enacted
from 1 Mar. till this day, viz. 13 Car. 2.*

I Come to the statutes concerning treason in the times of queen *Mary*, queen *Elizabeth*, and so downwards.

The first statute in this period is 1 *Mar. cap. 1.* consisting of three clauses.

1. " That no act, deed or offense being by act of parliament made treason, petit treason, or misprision of treason, by words, writing, cyphering, deeds, or otherwise whatsoever, shall be taken, had, deemed, or adjudged to be high treason, petit treason, or misprision of treason, but only such, as be declared and expressed to be treason, petit treason, or misprision of treason, in or by the act of parliament of 25 *E. 3.* touching treason or the declaration of treasons, and none other, nor that any pains of death, penalties, or forfeitures in any wise ensue or be to any offender or offenders for doing or committing any treason, petit treason, or misprision of treason, other than such as be
" in

(*) Our author should here have proceeded to his fourth general head, and have shown, what would be a confession within this statute of 5 & 6 *Ed. 6. cap.*

11. but probably he thought that sufficiently done by the second resolution in *Tonge's case* mentioned by him, *p. 304.*

“ in the said act ordained and provided, any statute made
 “ before or after the said 25th year of *Edward III.* or any
 “ declaration or matter to the contrary notwithstanding.

2. “ That no advantage be given by this act to any per-
 “ son arrested or imprisoned for treason, petit treason, or
 “ misprision of treason the last day of *September* last past, or
 “ heretofore indicted or outlawed, or attainted of treason, &c.
 “ or excepted out of the queen’s pardon.

3. “ That all offenses made felony, or appointed to be
 “ within the case of *præmunire* by any statute since the first
 “ day of the first year of king *Henry VIII.* (not being felony
 “ or within the case of *præmunire* before) and all and every
 “ branch, article, clause mentiond or declared in the same
 “ statutes concerning making of any offense felony, or within
 “ the case of *præmunire*, and all pains and forfeitures con-
 “ cerning the same, or any of them, shall be from hence-
 “ forth void and repeald.

This excellent law at one blow laid flat all those nume-
 rous treasons, misprisions, &c. at any time enacted since 25
E. 3. and all felonies and *præmunires* enacted in or after 1 *H. 8.*

As touching the first of these.

1. Hereby all those numerous treasons newly enacted in
 any former king’s time since 25 *E. 3.* a catalogue of most of
 which is before given, are wholly taken away.

2. Hereby all those treasons, that were declared treasons,
 so far forth as those treasons had their strength from such
 declarations, and were not really within the statute of 25 *E. 3.*
 are wholly taken away, and left purely to be determined ac-
 cording to the statute of 25 *E. 3.* and so far forth and no far-
 ther, than that statute warranteth.

And therefore the declaration of 3 *R. 2.* touching the kil-
 ling of an embassador, namely *John Imperiall*, the declaration
 of 3 *H. 5.* concerning clipping and impairing of coin, the de-
 claration of *Mortimer’s* treason in breaking prison 2 *H. 6.* and
 all others of that kind are now wholly put out by this sta-
 tute, *Coke* upon the statute *de frangentibus prisonam* (a), tho it

is true, that it appears by 1 & 2 P. & M. cap. 11. they thought that clipping and impairing of money had remained treason by the declarative law of 3 H. 5. but the statute of 5 Eliz. cap. 11. hath declared the contrary, and put that out of question.

3. But it repeald not the forfeitures for old treasons, tho those forfeitures were enacted by statutes made after 25 E. 3. and therefore the forfeiture of estates-tail for treason given by 26 H. 8. continues notwithstanding this statute, Co. P. C. p. 19. and so it was resolved by all the judges of England in the lord *Sheffield's* case (*), *Stamf.* 187. b. 12 Eliz. Dy. 289. the reason is before given cap. 23. p. 241. for the relation of the repealing clause is only to *treasons* not contained in 25 E. 3. not to *forfeitures* not contained in 25 E. 3. for indeed 25 E. 3. creates no forfeitures, but only declares what the common law was, and enacts no farther touching forfeitures.

4. But this act did not meddle with those new laws, that directed special proceedings, trials, &c. or other matters of that nature relating to treason, but that was done after by 1 & 2 P. & M. cap. 10. *de quo postea.*

5. The preamble is very considerable, which takes notice of the severity of former statutes, that made words only without other fact, or deed, to be high treason, which was one of the causes of this general repeal.

Touching the second clause, as is before observed in the precedent chapter, the repeal by 1 Mar. had discharged all offenses committed before that repeal against the statutes repeald, if it had not been specially provided to the contrary by the proviso of this act touching persons formerly indicted.

Now as to the third clause, it also took away all new felonies made since the first day of the reign of *Henry VIII.* but whether either of these clauses of repeal did take away those previous punishments, which for the first offense was made forfeiture of goods, and the second or third offense made treason, whether, I say, this statute took away those penalties, which were less than felony or treason in the first or second offense, or only those punishments, which were

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made

(*) *Palm.* 351. *W. Jones* 67.

made treason or felony, may be a question; as for instance, that of 1 E. 6. cap. 12. the 5th clause, which makes certain offenses by words punishable with forfeiture of goods for first offense, loss of profits of lands for second offense, and treason for the third offense; whether this statute extends to successors, and (tho the penalty of treason for the third offense be repealed by this act) whether the penalties for the first and second offenses be repealed, seems to me doubtful; I rather think they are not.

And now this act having laid all former new treasons, felonies, and misprisions flat, and reduced all to the standard of 25 E. 3. the necessity of state and public peace puts the queen and her parliament nevertheless to begin new provisions.

1 Mar. sess. 2. cap. 6. “ If any person shall falsely forge or
 “ counterfeit any such kind of coin of gold or silver, as is
 “ not the proper coin of this realm, and is or shall be cur-
 “ rent within this realm by the consent of the queen, her
 “ heirs or successors, or if any person do falsely forge or
 “ counterfeit the queen’s sign manual, or privy signet, or
 “ privy seal, then every such offense shall be judged high
 “ treason, and the offenders, their counsellors, procurers, aid-
 “ ers and abettors judged traitors against the queen, her heirs
 “ and successors, and suffer and forfeit as in high treason.

Concerning this statute much hath been said before.

1. It is a perpetual act, and not personal only to the queen, for as the word *king* may include a successor, so the word *queen* may include a succeeding king or queen, and that it was so intended here is apparent by the words in the conclusion *shall be adjudged traitors against the queen, her heirs and successors*; and accordingly it hath been often resolved.

2. That the foreign coin (the counterfeiting whereof is made treason by this act) must be such, as is so made current by proclamation, for by the statute of 17 R. 2. cap. 1. foreign coin is not to run in payment in *England*, and therefore there must be an act under the great seal, as all proclamations ought to be, before it can be current within this statute: *vide accordant statut. 5 Eliz. cap. 11. and 18 Eliz. cap. 1.*

3. It must be a counterfeiting of that foreign coin, which is stamped in *gold or silver, viz.* the greatest part gold, or the greatest part silver, for *denominatio fit a majore parte*; therefore if there be a foreign coin of copper, or brass and copper, it is not within this statute, but it is not necessary, that the counterfeit of it must be gold or silver, for if that be copper gilt, or alchemy after the similitude of foreign coin of gold or silver, it is within this act, because the prototype is a coin of gold or silver.

1 *Mar. sess. 2. cap. 12.* The act against riotous assemblies, is the very same in substance with that of 3 & 4 *E. 6. cap. 5.* only changing treason into felony within clergy, and *nota bene* the power given to suppress such assemblies by force, and indemnifying the suppressors, tho some of the rioters be killed: this act was continued by 1 *Eliz. cap. 16.* during that queen's life and till the next session after, and then expired. (b)

1 & 2 *P. & M. cap. 3.* “ If any person shall maliciously
“ and of his own imagination speak any false, seditious and
“ slanderous news, rumors, sayings, or tales, of the king or
“ queen, then the person being convicted and attainted, as in
“ the act is expressed, shall be set upon the pillory and have
“ both his ears cut off, unless he pay one hundred pounds,
“ and suffer three months imprisonment; and if it be of the
“ reporting of any other, then to stand on the pillory and
“ lose one of his ears, unless he pay one hundred marks
“ within one month after judgment, and suffer one month's
“ imprisonment.

“ And if any shall maliciously devise, write, print, or set
“ forth any writing containing any false matter of slander,
“ reproach, or dishonor to the king or queen, or to the en-
“ couraging, stirring or moving of any insurrection or rebel-
“ lion within this realm or the dominions thereof, or shall
“ procure the same to be written, printed, or set forth (the
“ said offense not being punishable as treason within the sta-
“ tute of 25 *E. 3.*) the offender shall for the first offense
“ have his right hand stricken off.

“ The

(b) But a new act to much the same purpose was made 1 *Geo. 1. cap. 5.* which is perpetual.

“ The second of any of these offenses after a former conviction is made punishable with loss of goods and perpetual imprisonment : justices of assize, &c. shall have power to hear and determine offenses, &c. and to commit persons suspected without bail ; no person impeachable for words, unless convicted within three months after the offense : peers to be tried by their peers.

Upon this act these things are observable : 1. That the law-makers did not take seditious words to be within the statute of 25 E. 3. for then they would have added the same clause as in the other case, *viz.* (*not being treason within the statute of 25 E. 3.*) Again, 2. That they did take it, that some seditious writings might be treason within the statute of 25 E. 3. for it is an overt-act, as hath been formerly observed (†). 3. That as some writings exciting insurrection *might be* treason within the statute of 25 E. 3. so some writings, that might possibly by construction have the same effect, *might not be* within that statute, for the law-makers cannot be supposed to intend to make any thing, that was treason within the statute of 25 E. 3. to be less than treason ; and by consequence and consequential illation many things might by a witty advocate be construed and heightened to be to move insurrection and rebellion, which immediately, and in their own nature, nor in the intention of the writer, were never so intended ; this statute died with the queen, but was revived 1 Eliz. cap. 6. during that queen’s life.

1 & 2 P. & M. cap. 9. “ If any by express words or sayings have prayed, or shall pray, that God would shorten the queen’s life, or take her out of the way, or any such like malicious prayer amounting to the same effect, they, their procurers and abettors shall be adjudged traitors.

“ But as to any the offenses aforesaid perpetrated during that session of parliament, if the offenders shall shew themselves penitent upon their arraignment, no judgment of treason shall be given against them, but a lesser punishment may be inflicted.

So that they took not this to be a treason within the statute of 25 E. 3. neither is it thought to be a very great offense, for it is an appeal to God, who we are sure is not moved by such wilhes and prayers contrary to his own command, *Thou shalt not curse the ruler of thy people*, Exod. xxii. 28.

1 & 2 P. & M. cap. 10. consisteth of several remarkable clauses.

1. " If any during the marriage between the king and
" queen shall imagine to deprive the king from having jointly
" with the queen the style, honor and kingly name of the
" realms and dominions belonging to the queen, or to de-
" stroy the king during the matrimony, or to destroy the
" queen, or the heirs of her body, being kings or queens of
" this realm, or to levy war within the realm or marches
" of the same against the king during the marriage, or a-
" gainst the queen or any of her said heirs, kings or queens
" of this realm, or to depose the queen or the heirs of her body
" kings or queens of this realm from the imperial crown of this
" realm, and the said compassings maliciously, advisedly and di-
" rectly shall utter by open preaching, exprels words or sayings,
" or if any person by exprels words shall maliciously, advi-
" sedly, and directly declare or publish, that the king during
" the marriage ought not to have jointly with the queen the
" style, honor and kingly name of this realm, or that any
" person, being neither the now king or queen, during the
" marriage between them ought to have the style, honor
" and kingly name of this realm, or that the now queen
" is not, or of right ought not to be queen of this realm,
" or after her death the heirs of her body, being kings or
" queens of this realm, ought not so to be or to enjoy the same,
" or that any person, other than the queen during her life,
" or after death, other than the heirs of her body, as long as
" one of the heirs of her body shall be in life, ought to be
" queen or king of this realm, then every such offender shall
" lose to the queen all his goods and chattles, and forfeit
" the issues of his lands during his life, and have perpetual
" imprisonment; the second offense after a former con-
" viction shall be treason.

2. “ And if any by writing, printing, overt-act, or deed
“ shall maliciously, advisedly and directly utter the things
“ afore said, then they, their abettors, procurers, counsellors,
“ aiders, and comforters knowing the said offense to be done,
“ and being thereof convicted and attainted by the laws and
“ statutes of this realm, shall be adjudged high traitors, and
“ forfeit their goods, lands and tenements to the queen, her
“ heirs and successors, as in case of high treason.

3. “ Provision for the government of the queen’s chil-
“ dren.

4. “ If any person, during the time that the king shall
“ have the ordering of the queen’s children, shall compass to
“ destroy the king, or to remove him from the government
“ of the said children, it shall be treason.

5. “ That all trials hereafter to be had, awarded or made
“ for any treason, shall be had and used only according to the
“ due order and course of the common laws of this realm,
“ and not otherwise, saving to all persons, (other than the
“ offenders and their heirs, and such persons as claim to any
“ of their uses,) all such rights, titles, interests, possession,
“ leases, &c. which they had at the day of the committing
“ of such treasons, or at any time before, as if this act had
“ never been made.

6. “ Concealment of any high treason shall be adjudged
“ only misprision of treason, and to forfeit and suffer as in
“ case of misprision notwithstanding this act.

7. “ Trial by peers is saved in treason or misprision of
“ treason.

8. “ None to be impeached for words, unless indicted
“ within six months after the offense.

9. “ Witnesses examined to or deposing any treasons in
“ this act, or at least two of them shall be brought forth
“ before the party arraigned, if he require the same, and say
“ openly in his hearing what they can say against him con-
“ cerning the treasons in the indictment, unless the party ar-
“ raigned shall willingly confess the same upon his arraign-
“ ment.

10. “ In all cases of high treason concerning coin current
“ within this realm, or counterfeiting the king’s or queen’s
“ signet, privy seal, great seal, or sign manual, such man-
“ ner of trial, and no other, shall be observed and kept, as
“ heretofore hath been used by the common laws of this
“ realm, any law, statute or other thing to the contrary not-
“ withstanding.

“ The counsellors, procurers, comforters, and abettors for
“ the first offense to suffer as the principal in the first offense,
“ and procurers, comforters and abettors for the second of-
“ fense to forfeit as the principal in the second offense.

This statute for so much as concerns the forfeiture or punishment inflicted for words, &c. and likewise the treasons newly enacted was but temporary, and died when the queen died without issue.

But there is still observable,

1. The great distinction, that was used between words and writing; those very things, which written were made in the first offense *treason*, being only spoken were in the first offense *but misdemeanor*, altho many of the words there mentioned sounded high, as namely that the queen is not or ought not to be queen, but some person else, whereby we may gather the opinion of parliaments in those times, that regularly words, tho of a high nature, were not treason, nor an overt-act of compassing the king’s death.

The 2d thing observable is, that here are some treasons newly enacted, which yet were treasons within 25 E. 3. as compassing to destroy and depose the queen, and declaring the same by writing or overt-act; and therefore this clause was omitted in the statute of 1 Eliz. cap. 6. and left to the statute of 25 E. 3.

The 3d thing observable herein is, that the queen’s husband is not within the act of 25 E. 3. therefore it was necessary to have an act of parliament for the securing of him, who was only the queen’s husband.

4. That tho there was a communication of the regal title to the queen’s husband, yet even that could not have been but by act of parliament, and yet no more is communicated,
but

but the title and name, not the authority and rule of a king of *England*.

The fifth clause concerning restoring of trial of treason according to the course of the common law is of great consequence and use, and is perpetual.

1. By this clause of the statute as to the case of high treason, the statutes of 27 E. 3. *cap.* 8. 28 E. 3. *cap.* 13. 8 H. 6. *cap.* 29. for trial of an alien *per medietatem lingue* are wholly repeald, and the trial shall be by *Englishmen*, 1 Mar. Dy. 144. *Shirly's case*, H. 36 Eliz. Dr. Lopez's case ruled *per omnes justiciarios*. Co. P. C. p. 27.

2. The trial of a lunatic without issue joined by 33 H. 8. *cap.* 20. and in a forein county by 33 H. 8. *cap.* 23. and for treasons in *Wales* 26 H. 8. *cap.* 6. 32 H. 8. *cap.* 4. are all repeald by this statute. Co. P. C. p. 24, 27.

3. But whether the statute of 1 E. 6. and 5 & 6 E. 6. concerning two witnesses be hereby repeald *vide supra* p. 298. only the 9th and 10th clauses of this statute seem strongly to imply, that this statute intended the repeal of it, for otherwise why should that special provision be added in this statute, for at least two of the witnesses formerly examined to repeat their testimony to the prisoner, if he desires it, when the statute of 5 & 6 E. 6. had more effectually provided for the same thing.

4. But the statute of 28 H. 8. *cap.* 15. concerning the trial of treason committed upon the high sea is not repeald, nor the statute of 35 H. 8. *cap.* 2. for trials of treasons out of the realm, because there was no way regularly appointed at common law for the trial of those treasons being done out of the bodies of counties; but it seems the trial of treasons committed in any place in rivers, or parts within the bodies of counties, tho the admiral claimed jurisdiction there, is restored to the common law, where it was originally triable.

Neither doth the act extend to petit treason, for treason generally spoken is intended of high treason; therefore the trial as to that stands in the same manner, as it was before the making of that act.

5. Peremptory challenge in case of high treason is restored by this act, and the statute of 33 *H. 8. cap. 23.* as to that point repealed, *vide accordant Co. P. C. p. 27. & libros ibi*; so that at this day he may challenge thirty-five, *viz.* under three juries peremptorily. *Co. P. C. ibidem.*

1 & 2 *P. & M. cap. 11.* “ Whosoever shall bring from the
 “ parts beyond sea into this realm, or into any of the domi-
 “ nions of the same, any false and counterfeit money, being
 “ current within this realm by the sufferance and consent of
 “ the queen, knowing the same coin to be false and coun-
 “ terfeit, to the intent to utter or make payment with the
 “ same within this realm, or any of the dominions of the
 “ same, by merchandizing or otherwise, the offenders, their
 “ counsellors, procurers, aiders and abettors in that behalf,
 “ shall be adjudged offenders in high treason, and after law-
 “ ful conviction shall suffer and forfeit, as in cases of high
 “ treason.

“ If any be accused or impeached of any offense within
 “ this statute, or of any other offense concerning the impair-
 “ ing, forging, or counterfeiting any coin current within this
 “ kingdom, he shall be indicted, arraigned, tried, convicted,
 “ or attainted by such like evidence, and in such manner
 “ and form, as hath been used and accustomed within this
 “ realm before the first year of the reign of *Edward VI.* any
 “ law, statute, &c. to the contrary notwithstanding.

Upon this statute several things are observable:

1. That the forein coin in this case must be such, as is made current in this realm by the consent of the queen, which cannot be without proclamation by writ under the great seal, as hath been before said *p. 213 & 310.*

2. That the party, that brings it in, must know it to be counterfeit.

3. That it must be brought into the king's dominions from some place, that is out of the king's dominions, and therefore the importation out of *Ireland* is held not to be an importation within this statute, for that is within the dominions of this realm, tho not within the realm. 3 *H. 7. 10. & vide supra cap. 20. p. 225. Co. P. C. p. 18.*

4. It must be brought with an intent to merchandize or make payment within this realm, and this intent may be tried by circumstances, tho the offender hath not yet actually made payment or merchandized with it: *vide antea p. 229.*

5. This is a new law, for the statute of 4 H. 7. cap. 18. whereby it was formerly enacted, is repealed by 1 Mar. cap. 1.

6. It is a law perpetual, tho it speaks only of coin made current by the consent of the king and queen our sovereign lord and lady, and so it hath been still taken.

7. That at this time it was taken, that impairing of the coin current within this realm was treason as to the proper coin of this realm by force of the declarative law of 3 H. 5. cap. 6. and that this was not repealed by 1 Mar. cap. 1. for there was no other law in force newly enacted for making impairing of the coin treason between 1 Mar. cap. 1. and 1 & 2 P. & M. cap. 11. but this error is reformed by the declaration of 5 Eliz. cap. 11.

8. That without any difficulty in the case of counterfeiting coin current in this kingdom there is no necessity of two witnesses, neither upon the trial nor upon the indictment, so that questionless, as to this treason, the clause of the statutes of 1 and 5 E. 6. concerning two witnesses is wholly repealed, for the statute saith he shall be *indicted*, &c. the omission of which word in the general clause of 1 & 2 P. & M. cap. 10. which concerns treasons in general, is that which gave the great countenance to that opinion of my lord Coke, that in other treasons there must be two witnesses upon the indictment, tho that statute, as to the trial, remitted the course of the common law.

I come now to the time of queen *Elizabeth*.

The statutes, that concern treason, I shall range in three ranks: 1. Such as more immediately concern the safety of the queen's person. 2. Such as concern the money of the kingdom. 3. Such as concern the safety of the queen's government in relation to papal usurpations and matter of religion.

I. I begin with the first rank, such as concern more immediately the safety of the queen's person.

1 *Eliz. cap. 5.* The statute of 1 & 2 P. & M. *cap. 10.* is recited, and that that statute extended only to queen *Mary* and the heirs of her body, the very same statute in effect is enacted over again, only with an application thereof to queen *Elizabeth*, and the heirs of her body, and almost all the same clauses are over again, except that, which concerns the trial of treason according to the common law, and the clause of compassing to destroy the queen, and manifesting the same by writing or overt-act; two witnesses are required to the indictment and arraignment of the prisoner: this act expired upon the queen's death without issue.

1 *Eliz. cap. 6.* The statute of 1 *Mar. sess. 2. cap. 3.* concerning seditious and false rumours is revived, as in relation to queen *Elizabeth*, under the same pains and penalties, as are therein contained, as tho the same act had extended to the heirs and successors of queen *Mary*, any doubt to the contrary notwithstanding; but this was personal to the queen and the heirs of her body, and was repealed by 23 *Eliz. cap. 2.*

13 *Eliz. cap. 1.* “ If any person during the natural life of
“ the queen shall, within the realm or without, compass or
“ imagine the death or destruction, or bodily harm tending
“ to death or destruction, maiming or wounding of her per-
“ son, or to deprive or depose her from the style, honor, or
“ kingly name of the crown of this realm, or of any other
“ realm or dominion belonging to her majesty, or to levy
“ war against her majesty within the realm or without, or
“ to move or stir any foreigners with force to invade this
“ realm, or any other her majesty's dominions being under
“ her obedience, and such compasses, imaginations, devices,
“ or intentions, or any of them shall maliciously, advisedly,
“ and directly publish, hold opinion, affirm or say by any
“ speech, express words or sayings, that the queen during
“ her life is not, or ought not to be queen of this realm of
“ *England*, and also of *France* and *Ireland*, or of any other
“ her majesty's dominions being under her obedience during
“ her life, or shall by writing, printing, preaching, speech,
“ express words or sayings, maliciously, advisedly, and di-
“ rectly

“ rectly publish and affirm, that the queen is an heretic,
 “ schismatic, tyrant, infidel, or usurper of the crown, every
 “ such offence shall be taken, deemed and declared by autho-
 “ rity of this parliament to be high treason; and the offen-
 “ ders, their abettors, counsellors and procurers, and the
 “ aiders and comforters of the same offenders, knowing the
 “ same, being indicted, convicted and attaind according to
 “ the usual order and course of the common law, or accord-
 “ ing to the act of 35 *H. 8.* for trial of treasons out of the
 “ realm, shall be deemed traitors, and suffer and forfeit as
 “ traitors.

2. “ If any person of any condition, place or nation, du-
 “ ring the queen’s life pretend, utter, or publish themselves,
 “ or any of them, or any other, than the now queen, to have
 “ right to enjoy the crown of *England* during the now queen’s
 “ life, or shall during the queen’s life usurp the crown, or
 “ the royal title, style or dignity of the crown of *England*, or
 “ shall during the queen’s life hold, or affirm, that the now
 “ queen hath not right to hold the said crown, realm, style,
 “ title or dignity, or shall not after demand made on the be-
 “ half of the queen acknowledge effectually, that the now
 “ queen is true and rightful queen of this realm, they shall
 “ be disabled during their natural lives only to enjoy the
 “ crown by succession after the queen’s death, as if such per-
 “ son were naturally dead.

3. “ If any person shall during the queen’s life hold or
 “ affirm a right, interest or succession to the crown to be in
 “ any such claimer, usurper or pretender, or not acknow-
 “ ledger after notification by proclamation of such claim, usur-
 “ pation or pretense, such person shall suffer as a traitor.

4. “ If any shall maintain, that the common laws, not al-
 “ tered by parliament, ought not to direct the right of the
 “ crown of *England*, or that the queen [*Elizabeth*] with and
 “ by the authority of parliament is not able to make laws of
 “ sufficient force to limit and bind the crown of *England*,
 “ and the descent, limitation, inheritance, and government
 “ thereof, or that this statute, or any statute to be made by
 “ authority of parliament with the queen’s royal assent for
 “ the

“ the limiting of the crown to be justly in the queen’s per-
“ son is not, or ought not to be of sufficient force to bind,
“ limit, restrain, and govern all persons, their rights and ti-
“ tles, that in any way might claim an interest; or possibi-
“ lity in or to the crown of *England* in possession, remain-
“ der, inheritance, succession, or otherwise, every such per-
“ son so holding, affirming or maintaining during the queen’s
“ life shall be judged a high traitor, and every person so
“ holding after the queen’s death shall forfeit all his goods
“ and chattles.

5. “ If any by writing or printing declare, before the
“ same be declared and established by act of parliament, that
“ any particular person ought to be right heir to the queen
“ (except the natural issue of her body) or that shall print,
“ set up, or sell such book, for the first offense he shall suf-
“ fer one year’s imprisonment, and forfeit half his goods,
“ and for the second offense it shall be a *præmunire*.

6. “ Trial of a peer by his peers is saved.

7. “ Saves the right of all, other than the offenders and
“ their heirs, claiming only as heir to the offender.

8. “ Offender within the queen’s dominions shall be in-
“ dicted within six months, and out of the dominions within
“ twelve months.

9. “ No person to be arraigned for any offense within this
“ act, unless it be proved by the testimony, deposition, or
“ oath of two lawful and sufficient witnesses, who shall at
“ the time of the arraignment of such person be brought be-
“ fore the party offending face to face, and there declare all
“ they can say against the party arraigned, unless the party
“ arraigned shall without violence confess the same.

10. “ The aider or comforter of such, as shall affirm the
“ queen a schismatic, heretic, tyrant, infidel, or usurper, shall
“ for his first offense, knowing the same to be committed,
“ incur a *præmunire*, and for his second offense, after con-
“ viction of the former, shall be a traitor.

11. “ Provided, that giving charitable alms in money,
“ meat, drink, apparel or bedding for sustentation of the
“ body, or health of any offender in any offense, made trea-

“son or *præmunire*, during the time of his imprisonment,
“shall not be taken to be any offense.

Tho this act be antiquated by the death of queen *Elizabeth*, yet there are (as in other acts of this nature that are expired) divers matters that are observable for the true understanding of the common law, and therefore I have repeated many acts of this nature at large.

1. This act doth contain and enact some treasons as new treasons, which certainly were treasons by the statute of 25 *E. 3.* as compassing to destroy or depose the queen, and manifesting the same by writing, printing, or overt-act; but it was thought or at least doubted, that manifesting the same barely by words were not within 25 *E. 3.* and it appears by the preamble, that this act was made to take away some doubts, as well as to provide new remedies.

2. It partly appears by this act, that the bare conspiracy to levy war was not treason by the statute of 25 *E. 3.* without a war levied, and accordingly it was resolved *P. 39 Eliz. Burton's case, Co. P. C. p. 10.* and therefore we are to be careful not to apply all convictions of treason in the queen's time, as judgments declarative of the statute of 25 *E. 3. de proditionibus*, because they were oftentimes indicted upon this statute in the queen's time, and the general conclusion of the indictment *contra formam statuti*, and sometimes generally *contra formam statut.* with an abbreviation was applicable to any statute then in force, which was most effectual to this purpose.

In *Anderson's reports, part. 2. n. 2. (c)*, it appears that in 37 *Eliz.* divers apprentices were committed for great riots, divers other apprentices conspired to deliver them out of prison, to kill the lord mayor of *London*, to burn his house, to break open two houses near the *Tower*, where there were arms for three hundred men, and to furnish themselves; after which divers apprentices threw about libels moving others to join with them and to assemble at *Bunhill*, where divers to the number of three hundred assembled, where they had a trumpet and a cloke upon a pole instead of a flag, and as they

were going towards the mayor's house, they were met by the sheriffs and swordbearer, against whom the apprentices offered resistance.

It was resolved, that this was treason within the statute of 13 *Eliz.* for it was an intention to levy war, and altho they intended no harm to the person of the queen, yet because it concerned her in her office and authority, and was for such things, which the queen by law and justice ought to do, it was a levying war against the queen, and they were condemned and executed.

This proceeding was upon this statute, and yet perchance, the circumstances of the case wholly laid together, this might have been an actual levying of war within 25 *E. 3.* but they thought it safer to proceed upon this statute.

3. That, tho regularly words alone make not an overt-act of compassing of the queen's death, yet printing or writing may do it, *Co. P. C. p. 12, 14.* and therefore an act of parliament was requisite to make it an overt-act; yet observe how cautiously it is penned, *maliciously, advisedly, and directly, &c.* leaving as little, as possibly may be, to construction.

4. That defamatory words, tho of a very high nature, do not always make treason; there cannot be more venomous words ordinarily thought of, than to say, the queen was an *heretic, schismatic, tyrant, usurper,* yet an act of parliament was necessary to make it treason.

5. That to make a man a principal in treason by comfort or aid after the offense committed it must be *knowingly,* and therefore I never thought that opinion of *Stamford, fol. 41. b.* to be law, that a receipt of a felon after attainder in the same county made a person accessory without notice, because he is bound at his peril to take notice, that he was attainted, for it oftentimes lies as little in the knowledge of many persons, who are convicted or attainted of felony or treason, as whether a man be guilty of it: *vide tamen Dyer 355.*

6. That regularly in a new treason the aiding and comforting of the traitors, knowing them to be such, makes a man guilty of treason, and therefore here is care by express provision to make the first offense a *premunire.*

7. Here

7. Here is great care to disable the heir to the crown from succeeding, if he usurp during the queen's life; but tho all the care imaginable was there used, yet it hath been held, that by the accession of the crown to the person so disabled, all these disabilities have vanished, *vide* 1 H. 7. 4. (d): see Mr. *Plowden's* learned tract touching the right of succession of *Mary* queen of *Scotland*.

8. *Nota* concerning the power of the king to limit the crown by consent of parliament.

9. That they took the statutes of 1 and of 5 & 6 E. 6. concerning two witnesses to be determined, or at least not to extend to treasons afterwards enacted, for otherwise there needed not this special care and provision *de novo* for two witnesses.

10. That as the aiding or comforting of one, that speaks seditious words, made treason on the second conviction, must be for the second offense after a conviction of the former, so the second offense, tho committed after a former, is not treason, unless it be also committed after a former conviction: the like method is in forgery upon the statute of 5 *Eliz. cap.* 14. and generally that exposition holds in most cases, where the second offense is subjected to a severer punishment than the former, for it is intended of such offense committed after the conviction of a former, *Co. P. C.* 172.

11. It is provided that charitable relief shall not make a party guilty of treason or *præmunire*, as an aider or abetter; this was a necessary provision to avoid question.

Regularly relief by victuals or clothes of a felon or of a traitor, after he is in custody or under bail, makes not a man an accessory in felony, nor a principal in treason; but if he

4

help

(d) The words of that book are, *That the king was a person able and discharged from any attainder eo facto, that he took upon him the government and the being king*; so that it was not the bare accession or descent of the crown, but the being in actual possession of the regal government, which was construed to remove all disabilities; this case therefore is no argument, that the statute of 13 *Eliz.* could not bar the right

of the successor, and hinder him from succeeding, but only that if notwithstanding he should get possession of the government, that possession would purge all disabilities, which is just as much as to say, that he, who can get the power into his hands notwithstanding an attainder or act of parliament to the contrary, will not think himself bound by such attainder or act of parliament.

help him to escape, that makes him an accessary in one case and a principal in the other, *Dalt. cap. 108. p. 286. (e)*, and with this agrees this proviso in the case of high treason; but *nota* it extends no farther than during the time of his imprisonment, yet the law is all one, if he be under bail, for he is *in custodia* still, for the bail are in law his keepers, and he, that is deliverd to bail in the king's bench, is nevertheless said to be *in custodia marescalli*.

14 *Eliz. cap. 1.* “ If any person do within this realm, or
“ elsewhere unlawfully, and of his own authority compass,
“ imagine, conspire, practise, or devise by any ways or means
“ with force, or by craft maliciously and rebelliously to take,
“ detain or keep from the queen any of her towers, castles,
“ fortresses or holds, or maliciously and rebelliously take, burn
“ or destroy them, having any of the queen's munition in
“ them, or being appointed to be guarded with soldiers within
“ the queen's dominions, and the same compassing do advi-
“ sedly by expresse words or deeds utter and declare for any
“ the malicious or rebellious intents aforesaid, it shall be ad-
“ judged felony in the offenders, their aiders, comforters,
“ counsellors and abettors without clergy.

“ If any shall with force maliciously or rebelliously detain
“ from the queen any of her majesty's castles, towns, for-
“ tresses or holds within any of her dominions, or any of
“ her ships, ordinance or artillery, or munition of war, and
“ not render the same within six days after proclamation, or
“ wilfully or maliciously burn or destroy any of her ships,
“ or bar any of her havens, this shall be treason.

This act to continue during the queen's life.

We may see by this act, that the opinion of the parliament in that time was, that this conspiring to take forts or ships by force or deceit was not treason; but indeed the actual taking them by force was levying of war against the king by the statute of 25 E. 3.

But if a man detains the king's town, or castle, or ships, and when any commissioned by the king demands the same, and it is refused to be deliverd, and thereupon the king's

commissioner raiseth a power, makes an assault, and they within stand upon their guard, and repel force with force, this had been treason within the statute of 25 E. 3. for it is a levying war, and so not a bare detaining; *quod vide Co. P. C. p. 10. bis in eâdem paginâ.*

Again, if this detaining the king's castle, or fort, or the castle of any other, be barely such and without assault, yet if it be in compliance with a foreign enemy, or in confederacy with him, this is treason within the act of 25 E. 3. and an overt-act of adhering to the king's enemies; that therefore, which this act makes treason in detaining after proclamation, is a simple detaining without the concurrence of the circumstances above-mentiond, which was not treason before the making of this act.

14 *Elix. cap. 2.* " If any person shall conspire, imagine, or go about unlawfully and maliciously to set at liberty any person committed by the queen's special command for any treason or suspicion of treason concerning the person of the queen before indictment of the person imprisoned, and such imagination or conspiracy shall set forth, utter or declare by express words, writing, or other matter, it shall be misprision of treason; but if the party imprisoned be indicted of any treason concerning the person of the queen, it shall be felony so to conspire and declare such conspiracy, *ut supra.*

" If it be after attainder or conviction, then such conspiracy so declared as aforesaid shall be high treason:" this act to last during the queen's life.

These things are observable upon this act, 1. Here is no provision against the actual discharge or setting at liberty, neither needed it, for if the party committed had really committed treason, this was treason even within the statute of 25 E. 3. but if it were only a commitment for treason, but no treason committed by the person in custody, such delivery was not treason, as appears before *cap. 22.* But 2. The conspiracy to do this, tho manifested by open act, was neither treason, misprision of treason, nor felony; neither is it at this day, but only a bare misdemeanor punishable by fine

and imprisonment, tho the party imprisoned were indicted, yea attainted. And 3. This act extends only to such treasons, as concerned immediately the queen's person, not to treasons touching her seal or coin.

And these are all the acts, that were made in the queen's time touching treasons, which more especially related to the safety of her person, all which expired at her death.

II. I come to those treasons, which were enacted in the queen's time concerning coin, and they are three.

5 *Eliz. cap. 11.* " Makes the filing, washing, rounding, and clipping of the coin of this realm, or forein coin made current by proclamation, for lucre or gain, and their counsellors, consenters and aiders to be high treason by virtue of this act.

14 *Eliz. cap. 3.* " Makes the counterfeiting of forein coin of gold or silver, not current within this realm, misprision of treason in the offenders, their procurers, aiders and abettors.

18 *Eliz. cap. 1.* " Makes the impairing, diminishing, falsifying, scaling or lightning of the coin of this kingdom or forein coin made current by proclamation for lucre-sake to be high treason in the offenders, their counsellors, consenters and aiders.

But of these sufficient hath been said before in the business of money, forfeiture and upon the statutes of 1 and 5 & 6 E. 6. The sum of which is this :

1. That the treasons made by the acts of 5 and 18 *Eliz.* are new treasons, newly made by virtue of this act, and every body is estopped to say the contrary by reason of the special recital and penning of this act, *viz. shall be adjudged treason by virtue of this act.*

2. That the forein coin, the clipping and impairing whereof is made treason by this act, must be such as is made current by proclamation, for it cannot be otherwise current by reason of the prohibition of the statute of 17 R. 2. *cap. 1.* and also, the word *proclamation* in those acts refer to forein coin so legitimated by proclamation, not to the proper coin of this kingdom, which needs not a proclamation to legitimate it.

3. The

3. The trial and whole proceeding is to be according to the courſe of the law by the expreſs words of theſe acts and of 1 & 2 P. & M. cap. 11. and therefore there need not two witneſſes required by the acts of 1 and the 5 & 6 E. 6.

4. Not only the offenders themſelves, but the counſellors, conſenters and aiders are within thoſe acts; but altho regularly in caſe of any old or new treaſon made, the comforters and receivers of the offender are impliedly guilty of treaſon by a kind of neceſſary concomitance, yet it ſeems to me by the ſpecial penning of this act, it extends only to counſellors, aiders and conſenters (according to the reſolution in *Conyer's* caſe, *Dy.* 296.) as to the offences made treaſon by thoſe acts, tho poſſibly it may be treaſon, as to the receiver of a counterfeit within the ſtatute of 25 E. 3. according to my lord *Coke's* opinion, *Co. P. C. cap.* 64. *p.* 138. for that is an old treaſon, and no ſuch reſtriction by expreſs words to counſellors, aiders and aſſenters.

5. The clipping and impairing, that makes treaſon within theſe acts, muſt by the expreſs words of the act be *for gain or lucre*, and ſo laid in the indictment.

6. Counterfeiting of coin not current to bring it within a *premunire* by the ſtatute of 14 *Eliz. cap.* 3. muſt be a counterfeiting of ſuch foreign coin, as is of gold or ſilver, or conſiſts thereof for the greateſt part, and extends not to the foreign copper, or leather coin.

7. No corruption of blood or loſs of dower are to be by attainders of theſe treaſons.

III. Therefore I come to the third ſort of ſtatutes made in this queen's time, which relate to the queen's government, and eſpecially in relation to papal uſurpation.

1 *Eliz. cap.* 3. is an act of recognition of the queen to be rightful ſovereign of this realm, and all acts repugnant thereunto are repealed; and *cap.* 1. the oath of ſupremacy is enacted to be taken by the perſons therein deſcribed: the tenor of which oath followeth in theſe words, *viz.*

“ I *A. B.* do utterly teſtify and declare in my conſcience,
 “ that the queen's highneſs is the only ſupreme governor of
 “ this

“ this realm, and of all other her highness’s dominions and
“ countries, as well in all spiritual or ecclesiastical things or
“ causes, as temporal, and that no forein prince, person,
“ prelate, state, or potentate hath or ought to have any ju-
“ risdiction, power, superiority, preeminence or authority,
“ ecclesiastical or spiritual within this realm, and therefore
“ I do utterly renounce and forsake all forein jurisdictions,
“ powers, superiorities and authorities, and do promise, that
“ from henceforth I shall bear faith and true alligance to
“ the queen’s highness, her heirs and lawful successors, and
“ to my power shall assist and defend all jurisdictions, privi-
“ leges, preeminences and authorities granted or belonging
“ to the queen’s highness, her heirs and successors, or united
“ and annexed to the imperial crown of this realm.” So help
me God and by the contents of this book. (*f*)

Every person appointed to take the oath, and refusing, shall lose his offices and benefices, and be disabled to take any office or benefice, &c. and then proceeds to other penalties upon refusers.

And by that act it is enacted, “ That if any person inha-
“ biting within the queen’s dominions shall by writing,
“ printing, teaching, preaching, express words, deed or act
“ advisedly, maliciously, and directly affirm, hold, stand
“ with, set forth, maintain, or defend the authority, preemi-
“ nence, power or jurisdiction spiritual or ecclesiastical of
“ any forein prince, prelate, person, state or potentate what-
“ soever, heretofore claimed, used or usurped within this
“ realm, or any dominion or country under the queen’s o-
“ beyfance, or shall advisedly, maliciously, and directly put
“ in ure, or execute any thing for the extolling, advance-
“ ment, setting forth, maintenance, or defense of any such
“ pretended or usurped jurisdiction, power, preeminence or
“ authority, or any part thereof, every person so offending,
“ his abettors, aiders, procurers and counsellors, being con-
“ victed according to the course of the common law, shall
4 P “ for

(*f*) This oath, and this statute so far as relates to the said oath, are abrogated by 1 W. & M. cap. 8.

“ for the first offense forfeit his goods and chattles, and, if
 “ not worth twenty pounds, shall also suffer a year’s impri-
 “ sonment, and all his ecclesiastical benefices and dignities
 “ shall be void, and for a second offense committed after at-
 “ tainder of the first shall be within penalty of *premunire*,
 “ and for the third offense committed after his second con-
 “ viction, it shall be adjudged high treason.

None to be impeached for words only, unless indicted within a year after the offense committed; and if imprisoned, to be set at liberty, unless indicted within half a year after the offense: trial of a peer by peers.

None to be indicted, &c. without two witnesses, which if living shall be brought face to face before the prisoner upon his arraignment, and testify what they can say, if the prisoner require it.

Giving of relief, aid or comfort to offenders shall not be punishable, unless proved by two witnesses, that he had notice of the offense at the time of such relief given.

5 *Eliz. cap. 1.* “ If any person dwelling, inhabiting, or re-
 “ sident within the queen’s dominions or under her obedience,
 “ shall by writing, cyphering, printing, preaching, deed or
 “ act, advisedly and wittingly hold, or stand with, to ex-
 “ tol, set forth, maintain or defend the authority, jurisdiction,
 “ or power of the bishop of *Rome*, or his see, heretofore
 “ claimed, used, or usurped within this realm or any domi-
 “ nion or country under the queen’s obedience, or by speech,
 “ open act or deed advisedly and wittingly attribute any such
 “ manner of jurisdiction, authority, or preeminence to the
 “ said see or bishop of *Rome* for the time being within this
 “ realm or any the queen’s dominions, then every such per-
 “ son, their procurers, abettors and counsellors, and also
 “ their aiders, comforters and assistants upon the purpose a-
 “ foresaid, to extol the authority of the bishop of *Rome*, be-
 “ ing lawfully convicted within one year shall incur a *præ-*
 “ *munire*.

It directs who shall take, and give the oath of supremacy.

Any person appointed to take this oath by this statute or the statute of 1 *Eliz.* who shall refuse to take the same, being
 thereof

thereof lawfully indicted within one year, and convict or attaint at any time after, shall incur a *præmunire*. 16 R. 2.

Certificate of refusal to be made into the king's bench within forty days after refusal; the king's bench may proceed to indict the party refusing within a year by a jury of the same county, where the court sits.

If any person convict of the offenses within the first clause of the statute shall after conviction thereof do the said offenses or any of them, or if any person appointed to take the oath, do after three months after the first tender refuse to take the same being tendred a second time, the offender shall suffer as in case of high treason.

Attainder of treason upon this act shall not make corruption of blood, disherit the heir, or forfeit dower.

Members of the house of commons shall take the said oath, otherwise shall be disabled to sit.

Temporal lords of parliament shall not be bound to take the oath, nor subject to the penalties for refusing the same.

The charitable giving of reasonable alms to an offender without fraud or covin shall not be construed an abetting, counselling, aiding, assisting, procuring or comforting of an offender within this act: peers indicted shall be tried by peers; as in other cases of treason.

No person compellible to take the oath upon second tender, but such as have ecclesiastical preferments, or such as have offices in ecclesiastical courts, or such as refuse wilfully to observe the orders established for divine service, or such as shall deprave the rites and ceremonies of the church of *England*, or that shall say or hear private mass.

Not lawful to kill person attaint in *præmunire*.

No person to be indicted for aiding, assisting, comforting, abetting any person for extolling the power of the bishop of *Rome*, unless accused by such lawful proof, as shall be thought by the jury sufficient to prove him guilty of the offence.

The things observable upon this act,

1. Tho the indictment for the refusal of the oath upon the first tender may be in the county, where the king's bench

bench fits, yet the trial must be by a jury of the county where the refusal is, 6 & 7 *Eliz. Dy. 234. a. Bonner's case.*

2. If books extolling the pope's jurisdiction be written beyond sea, and brought in hither, it was ruled by the advice of all the judges; 1. The importer, that delivers them out to extol the pope's authority. 2. He that reads them, and in conference with others allows them to be good. 3. He that hears the contents, and in open speech with others commend and affirm them to be good. 4. He that hath such books in his custody, and secretly conveys them to his friends to the intent to perswade them to be of that opinion. 5. He that prints such books in this realm, and utters them, are within the first clause of this statute against extolling of papal authority; but those that receive and read them without allowing them in conference, are not within this act.

3. An indictment against an aider, &c. must be, *knowing* the principal to be a maintainer of the jurisdiction of the pope, and *contra formam statuti* only, is not sufficient. *Dy. 363. a.*

4. *Nota* this special clause of giving alms not to make an aider or comforter, if the alms be reasonable, and without covin, tho the offender not imprisoned, nor under bail, seems to be but agreeable to the common law; *vide quæ supra dicta sunt super statutum* 13 *Eliz. cap. 1.* and therefore it seems, even by the common law, if a physician or chirurgion minister help to an offender sick or wounded, tho he know him to be an offender, even in treason, this makes him not a traitor, for it is done upon the account of common humanity, not *intuitu criminis vel criminosi*; but it will be misprision of treason, if he know it, and do not discover him.

23 *Eliz. cap. 1.* " All persons whatsoever, who have or
 " shall have or pretend to have power, or shall any way put
 " in practice to absolve, perswade, or withdraw any of the
 " queen's subjects, or any within her dominions from their
 " natural obedience to her majesty, or to withdraw them for
 " that intent from the religion now by her highness's au-
 " thority established within her highness's dominions to the

“ *Romish* religion, or to move them or any of them to promise any obedience to any pretended authority of the see of *Rome*, or of any other prince, state or potentate, to be had or used within her dominions, or shall do any overt-act to that intent or purpose, they shall be adjudged traitors; and the persons who shall be willingly absolved, or withdrawn as aforesaid, or willingly reconciled, or shall promise obedience to any such pretended authority, prince, state, or potentate as aforesaid, they, their procurers and counsellors thereunto shall suffer as in case of high treason.

“ Aiders and maintainers of the persons offending, knowing the same, or who shall conceal such offense, and not within twenty days disclose the same to some justice of peace, &c. shall forfeit as in misprision of treason: justices of peace to have cognisance of offenses, except treason and misprision of treason.

Nota, the words (*for that intent*) run through the whole clause of dissuading from the religion of the church of *England*: *vide postea* statute 3 *Jac.* cap. 4.

The religion established within the meaning of this act seems to be that book of articles mentioned and enjoined to be assented to by all men taking orders by the statute of 13 *Eliz.* cap. 12.

23 *Eliz.* cap. 2. “ Advised and malicious speakers of seditious or scandalous tales of the queen of their own imagination shall for the first offense be set upon the pillory, lose both ears (or at the offender’s election pay two hundred pounds) and suffer six months imprisonment.

“ If any shall advisedly and with malicious intent report false, seditious and slanderous news or tales of the queen of the reporting of another, then to be set on the pillory and lose one of his ears (unless he pay two hundred marks) and suffer imprisonment three months: second offense after a first conviction shall be felony without clergy.

“ If any shall within or without the queen’s dominions advisedly and with a malicious intent against the queen devise and write, print, or set forth any book or writing;

“ containing any false, seditious or scandalous matter against
 “ the queen, or to the encouraging, stirring, or moving any
 “ insurrection or rebellion within the realm or dominions
 “ thereof; or if any person within or without the realm shall
 “ advisedly, and with a malicious intent against the queen
 “ procure, or cause any such book or writing to be written,
 “ printed, published or set forth, (the said offense not being
 “ punishable by the statute of 25 E. 3. concerning treason,
 “ or by any other statute, whereby an offense is made or de-
 “ clared treason) every such offense shall be judged felony
 “ without the benefit of clergy.

“ If any person either within or without the queen’s do-
 “ minions shall by erecting a figure, casting nativities, pro-
 “ phecying, witchcraft, conjurations, or other like unlawful
 “ means seek to know, and shall set forth by express words,
 “ deeds, or writings, how long the queen shall live, or who
 “ shall reign after her, or maliciously utter any direct prophe-
 “ cies to that purpose, or shall maliciously by words, writings
 “ or printing wish, will or desire the death or deprivation of
 “ the queen, or any thing directly to the same effect, the of-
 “ fender, their aiders, procurers and abettors in or to the said
 “ offenses shall suffer as felons without the benefit of clergy.

Offenses made felony by this act committed by persons out of the realm shall be inquired, heard and determined in the county, where the king’s bench sits, and limits the proof and manner of proceeding; no corruption of blood, loss of dower, or forfeiture of lands longer than during life.

Two witnesses required to prove words.

The act of 1 & 2 P. & M. and 1 Eliz. concerning scandalous words are repeald: this act to continue only during the queen’s life.

These things are observable upon this act,

1. There may be some words or writings, that consequentially may be construed to stir up insurrection, and yet are not within the statute of 25 E. 3. for this statute supposes some may be within it, and some may not.

2. That casting the king’s nativity, how long he shall live, who shall succeed him, or using prophecies to that effect, tho

done maliciously, or wishing the king's death, was not treason within the act of 25 E. 3. or of any statute then in force, tho they are great offenses; for had they been treason, this statute would never have made it only felony, and that only during the queen's life.

27 *Eliz. cap. 1.* " If any open invasion or rebellion shall
" be made within her majesty's dominions, or any act at-
" tempted tending to the hurt of her majesty's person by or
" for any person, that shall or may pretend title to the crown
" after the queen's death, or if any thing shall be compassed
" or imagined tending to the hurt of the queen's person by
" any person or with the privity of any person, that shall
" or may pretend title to the crown of this realm, then by
" her majesty's commission twenty-four privy counsellors and
" lords of parliament at least, with the assistance of such
" judges of the courts of *Westminster*, as the queen shall ap-
" point, or the greater number of them, shall by virtue of
" this act have authority to examine all and every the of-
" fenses aforesaid, and all circumstances thereof, and there-
" upon to give sentence or judgment, as upon good proof
" the matter shall appear unto them; and after such sen-
" tence or judgment given, and declaration thereof by her
" majesty's proclamation under the great seal, all such per-
" sons, against whom such judgment or sentence shall be gi-
" ven or published, shall be excluded and disabled to claim
" or pretend to have any title to the crown of *England*.

" And all the queen's subjects may by virtue of this act
" and her majesty's direction by all possible means pursue to
" death every such wicked person, by whom such invasion
" or wicked act shall be attempted, or other thing compas-
" sed or imagined against her majesty's person, and all their
" aiders, comforters and abettors.

Provision is made in case the queen should be killed by such attempt for prosecution of the offender, and exclusion of the person offending from succession to the crown, &c.

Nota, this extraordinary commission was issued thus by authority of parliament in relation to the queen of *Scots*, who was by virtue thereof sentenced to death and executed.

This

This was but a temporary act, but the precedent of this commission to sentence and give judgment without a trial by jury was the first of that nature, that I remember to have been issued by parliament.

27 *Elix. cap. 2.* “ It shall not be lawful for any jesuit, seminary priest, or other such priest, deacon, or religious or ecclesiastical person whatsoever being born within this realm or other her highness’s dominions, and made, ordained or professed, or to be made, ordained or professed by any authority or jurisdiction derived, challenged or pretended from the see of *Rome* by or of what name, title or degree soever the same shall be called or known, to come into, be or remain in any part of this realm, or any of her highness’s dominions after the end of forty days, other than in such special cases, and upon such special occasions only, and for such time only, as is expressed in this act; and if he do, then every such offense shall be high treason, and every such person as shall wittingly and willingly receive, relieve, comfort, aid, or maintain any such priest, &c. being at liberty and out of hold, knowing him to be such, shall be guilty of felony without clergy.

“ If any of the queen’s subjects (not being a jesuit, seminary priest, deacon, or religious or ecclesiastical person) be brought up in any college or seminary beyond sea, shall not return within six months after proclamation in *London*, and within two days after his return before the bishop of the diocese, or two justices of the peace submit to her majesty’s laws, and take the oath of supremacy, then such person, who shall otherwise return into this realm or other the queen’s dominions, shall be adjudged a traitor.

“ Sending relief to any jesuit, seminary priest, or college of priests or jesuits beyond the seas, or to one not returning out of such college into *England*, shall incur a *premunire*.

“ Every offense against this act shall be tried in the king’s bench in the county where it sits, or in any other county, where the offense was committed, or offender apprehended.

“ If a jesuit, seminary priest, &c. within three days after his arrival in the queen’s dominions submit to some arch-

“ bishop, bishop, or justice of peace, and take the oath of
“ supremacy, and by writing under his hand profess to con-
“ tinue obedient to the laws, then he shall not be subject to
“ any penalty.

“ Trial of peers in the case of treason, felony, or *premu-*
“ *nire* to be by peers.

“ Any person knowing such priest to be within the realm
“ contrary to this act, and not discovering it to a justice of
“ peace, &c. within twelve days, shall be fined and impris-
“ oned during the queen’s pleasure, and a justice of peace
“ to whom such discovery is made, not informing one of
“ the privy council, &c. shall forfeit two hundred marks.

29 *Eliz. cap. 2.* “ No attainder of treason that now is,
“ where the party is executed, shall be reversed for error.

25 *Eliz. cap. 2.* “ A suspected jesuit or priest refusing to
“ answer directly upon his examination shall be imprisoned
“ for his contempt, until he shall make direct answer.

And these are all the acts concerning treason in the
queen’s time, that I remember, except particular acts of at-
tainer, whereof some are temporal, some perpetual.

In the time of king *James*, besides the particular acts
touching the treason of the conspirators of the powder-plot, and
the treasons of the lords *Cobham* and *Gray*, there are some ge-
neral clauses touching treason in the statutes of 3 *Jac. cap. 4. (g)*,
and 5. and among them this special clause which enlarged
the statute of 23 *Eliz. cap. 1. viz.*

“ If any person shall upon or beyond the seas, or in any
“ other place within the dominions of the king, his heirs or
“ successors, put in practice to absolve, perswade or with-
“ draw any of the king’s subjects from their natural obedi-
“ ence to his majesty, his heirs or successors, or to reconcile
“ them to the pope or see of *Rome*, or to move any of
“ them to promise obedience to any pretended authority of
“ the see of *Rome*, or any other prince, state or potentate,
“ then such persons, their procurers, counsellors and aiders,
“ and maintainers knowing the same shall be adjudged trai-

4 R

“ tors,

(g) The oath of allgiance appointed to the said oath, are abrogated by 1 *W.*
hereby, and this statute so far as relates & *M. cap. 8.*

“ tors, and likewise the persons willingly absolved or with-
 “ drawn, &c. their aiders, abettors, maintainers, &c. know-
 “ ing the same shall be adjudged traitors, to be indicted
 “ and proceeded against in any county where taken, as if
 “ the offense were committed in that county.

This act is much more strictly pend against such offenders, than the statute of 23 *Eliz. cap. 1.* 1. It extends larger as to the place of such offense. 2. The words (*to that intent*) which bound up the statute of 23 *Eliz.* more strictly, are here omitted. 3. The disjunctive clauses in this statute have a greater latitude. 4. It extends to maintainers of the offenders knowing the same.

Neither do I find any special new act generally touching treason from this time till the 13th year of king *Charles II.*

13 *Car. 2. cap. 1.*

1. “ If any person after 24 *June 1661.* during the king’s
 “ life shall within the realm or without compass, imagine,
 “ invent, devise, or intend death or destruction, or any
 “ bodily harm tending to death or destruction, maim,
 “ wounding, imprisonment, or restraint of the person of
 “ the king, or to deprive or depose him from the style,
 “ honour, or kingly name of the imperial crown of this
 “ realm, or of any other his majesty’s dominions or coun-
 “ tries, or to levy war against his majesty within the realm
 “ or without, or to move or stir up any foreiner to invade
 “ this realm, or any other his majesty’s dominions being un-
 “ der his majesty’s obedience, and such compassings, imagina-
 “ tions, inventions, devices, or intentions, or any of them shall
 “ express, utter, or declare by any printing, writing, preaching,
 “ or malicious and advised speaking, being legally convicted
 “ thereof upon the oath of two lawful and credible witnesses
 “ upon trial, or otherwise convicted or attainted by due
 “ course of law, then every such person shall be deemed a
 “ traitor, and suffer and forfeit as in cases of high treason.

2. If any after 24 *June 1661.* during his majesty’s life
 “ shall maliciously and advisedly publish or affirm, that the
 “ king is an heretic or papist, or endeavours to introduce po-
 “ pery, or maliciously and advisedly by writing or speaking
 “ shall

“ shall express, publish, utter or declare any words or things
“ to incite the people to hatred or dislike of his majesty or
“ the established government, shall be disabled to enjoy any
“ office or promotion ecclesiastical, civil, or military, or other
“ employment, than that of peerage, and suffer such further
“ punishment as may be by law inflicted.

3. “ Any that shall maliciously and advisedly affirm the
“ parliament of 3 Nov. 1640. is yet in being, or that there
“ lies obligation upon any by any oath, engagement or cove-
“ nant to endeavour a change of government in church or
“ state, or that both or either house of parliament have a
“ legislative power without the king, shall incur the penalty
“ of a *premunire* 16 R. 2.

4. “ No person to be prosecuted for any of the said of-
“ fenses, except treason, but by order of the king under his
“ sign manual, or of the council, nor unless prosecuted within
“ six months after the offense, and indicted within three
“ months after prosecution.

5. “ None to be indicted, arraigned, convicted, or con-
“ demned of any of the said offenses, unless the offender be
“ accused by two lawful and credible witnesses upon oath,
“ which witnesses upon his arraignment shall be brought in
“ person before the offender face to face, and maintain upon
“ oath what they have to say against him, unless the party
“ arraigned shall willingly without violence confess the same.

6. “ This shall not deprive members of parliament of their
“ free debates.

“ Trial by peers: peer convicted disabled to sit in parlia-
“ ment till his majesty pardon him. (b)

(b) The acts relating to treason and offenses of that nature, which have passed since our author wrote, may be reduced to these three heads: 1. Such as more immediately relate to the king and his government. 2. Such as relate to the coin. 3. Such as relate to the manner of trials and other proceedings.

I. As to the first, such as relate to the king and his government.

By 9 W. 3. cap. 1. “ If any of the
“ king’s subjects, who have voluntarily
“ gone into *France*, or any the *French*
“ king’s dominions in *Europe* before 11
“ Dec. 1688. without licence from the

“ king or queen, or who have at any
“ time during the late war with *France*
“ born arms in the service of the *French*
“ king, or who have since the 13 Fe-
“ bruary 1688. been in arms under the
“ command or in the service of the
“ late king *James* in *Europe*, shall
“ return into this kingdom of *England*,
“ or any other the king’s dominions
“ without licence from the king under
“ the privy seal, such person shall be ad-
“ judged guilty of high treason. Where
“ the offense shall be committed out of
“ the realm, it may be tried in any
“ county. Upon

Upon this act these things are observable,

1. That this act doth enact some treasons, which certainly were so by 25 E. 3. as bearing arms in the service of the French king during the war wth France, which is plainly an adhering to the king's enemies; and tho 25 E. 3. says *adhering to the king's enemies in the realm*, yet it immediately adds *giving them aid and comfort in his realm or elsewhere*, Co. P. C. p. 11. Vaughan's case, 2 Salk. 635. indeed all the treasons by this act are compounded of this old treason, altho they be new in form for the sake of facilitating the proof in some instances, Hil. 2 Ann. Boucher's case, State Tr. Vol. V. p. 511.

2. That a pardon under the great seal (after having been in the service of the French king and before returning) of all treasons, &c. will not amount to a licence to return, because it is the returning, which is the treason punishable by this act. 3 Ann. Lindsay's case, State Tr. Vol. V. p. 528.

3. That a Scotchman going out of Scotland into France (especially if formerly resident in England) after the time mentioned in the act, and returning into England is within the words and meaning of the act, even tho he had a licence to return into Scotland. *Ibid.*

4. That a person offending against this act by returning into England may be indicted in any county, where he is taken, altho it be not the first English county into which he came. *Ibid.*

5. That this act is perpetual and extends to the king's successors, altho the act speak only of the king generally and not of his successors, according to the resolution 12 Co. Rep. 109. *vide supra* p. 100.

By 13 & 14 W. 3. cap. 3. "The pretended prince of Wales is attainted of high treason, and it is made high treason for any of the king's subjects by letters, messages or otherwise to hold correspondence with him or any person employed by him, or to remit any money for his use knowing the same. Provides that offenses against this act committed out of the realm may be tried in any county.

By 1 Ann. cap. 17. "It is made high treason to attempt by overt act or deed to deprive or hinder any person next in succession to the crown (according to the limitation of the crown by 1 W.

" & M. sess. 2. cap. 2. and 12 W. 3. cap. 2.) from succeeding after the decease of the queen; but this succession has now happily taken place, and thereby put an end to this statute.

By 3 & 4 Ann. cap. 14. "If any subject, who has voluntarily gone into France since 4 May 1702. or into any the French king's dominions in Europe without licence from the queen, or has since the said 4 May born arms in the service of the French king, shall return into England without licence from the queen under her privy seal, he shall be adjudged guilty of high treason.

By 4 Ann. cap. 8. "It is made high treason for any one maliciously to affirm by writing or printing, that the pretended prince of Wales, or any other person hath any right to the crown of these realms, other than according to 1 W. & M. and 12 W. 3. or that the kings of England are not able by authority of parliament to make laws to bind the descent, limitation, inheritance and government of the crown. To declare the same things by preaching, teaching or advised speaking is made a *premunire*.

This act (which is in the main transcribed from 13 Eliz. cap. 1.) was re-enacted upon occasion of the union 6 Ann. cap. 7. Upon this statute Matthews the printer was convicted and executed for printing a pamphlet intituled, *Vox Populi Vox Dei*, Octob. 30. 1719. at the Old Bailey.

By 7 Ann. cap. 4. "It is high treason for any officer of the army or soldier by land or sea to hold correspondence with any rebel or enemy to her majesty, or to treat with such rebel or enemy without her majesty's licence.

By 7 Ann. cap. 21. "Whatever is high treason or misprision of treason in England, (and none else) shall be high treason or misprision of treason in Scotland.

II. Such as relate to the coin.

By 8 & 9 W. 3. cap. 25. "Whoever shall knowingly make or mend, or assist in making or mending, or shall buy or sell, or have in his possession any instruments proper for the coinage of money, or convey such instruments out of the king's mint, or shall mark on the edges any coin current or diminished coin of the kingdom, or any counterfeit coin resembling the coin of
" the

“ the kingdom with letters or other
 “ marks like to those on the edges of
 “ money coined in the king’s mint, or
 “ shall colour, gild or case over any
 “ coin resembling the current coin of
 “ the kingdom, or any round blanks of
 “ base metal, &c. shall be guilty of high
 “ treason. No attainder by this act shall
 “ work corruption of blood or loss of dow-
 “ er, nor prosecution be for any offense
 “ against the same, unless commenced
 “ within three months after the offense
 “ committed :” this act was but tem-
 porary.

But by 7 *Ann. cap.* 25. it is made per-
 petual, and the time of prosecution en-
 larged from three months to six months
 after the offense committed.

III. Such as relate to the manner of
 trials and other proceedings.

By 7 *W. 3. cap.* 3. “ Every person in-
 “ dicted for high treason, whereby cor-
 “ ruption of blood may be made, shall
 “ have a true copy of the whole indict-
 “ ment, but not the names of the wit-
 “ nesses, delivered to him five days be-
 “ fore his trial, paying for it not exceed-
 “ ing five shillings, and shall be admit-
 “ ted to make his defense by counsel,
 “ and witnesses on oath, the said coun-
 “ sel not to exceed two, and to be as-
 “ signed by the court, and to have ac-
 “ cess to the prisoner at all reasonable
 “ times.

“ No person shall be indicted, tried,
 “ or attainted but on the oaths of two
 “ lawful witnesses, which two witnesses
 “ must be to the same treason,” altho
 it be not necessary they should both be
 to the same overt-act.

“ No prosecution to be for any such
 “ treason unless the party be indicted
 “ within three years after the offense
 “ committed, unless it be for a design
 “ or attempt to assassinate the king by
 “ poison or otherwise.

“ The prisoner shall have a copy of
 “ the pannel of the jurors two days be-
 “ fore his trial, and shall have like pro-

“ cess to compel the appearance of wit-
 “ nesses for him, as is usually granted for
 “ witnesses against him.

“ No evidence shall be given of any
 “ overt-act not expressly laid in the in-
 “ dictment.

“ No indictment, process, &c. shall
 “ be quashed for mis-writing, mis-spel-
 “ ling, false or improper *Latin*, unless
 “ exception be taken in court before
 “ any evidence given upon such indict-
 “ ment, nor shall any such mis-writing,
 “ &c. be cause to stay judgment after
 “ conviction, but such judgment may ne-
 “ vertheless be reversed upon writ of er-
 “ ror, as before the making this act.

“ In the trial of a peer or peers all
 “ peers intitled to vote in parliament
 “ shall be summoned twenty days be-
 “ fore the trial, and every one so
 “ summoned and appearing shall vote
 “ at such trial, first taking the oaths to
 “ the government, &c.

“ Provided that this act shall not
 “ extend to impeachments or other pro-
 “ ceedings in parliament, nor to indict-
 “ ments of high treason, nor any pro-
 “ ceedings thereupon for counterfeiting
 “ his majesty’s coin, great seal, privy
 “ seal, sign manual, or privy signet.

By 1 *Ann. cap.* 9. “ In any trial for
 “ treason or felony the witnesses for the
 “ prisoner shall be upon oath.

By 7 *Ann. cap.* 21. “ After the decease
 “ of the present pretender no attainder
 “ of treason shall work a disinheritance of
 “ the heir, nor affect any other right,
 “ save that of the offender for his natu-
 “ ral life only, and every person indicted
 “ for high treason or misprison of trea-
 “ son shall have a list of the witnesses
 “ to be produced against him on his
 “ trial, and of the jury, mentioning the
 “ places of their abode, &c. given to
 “ him together with the copy of the
 “ indictment ten days before his trial
 “ in the presence of two credible wit-
 “ nesses.

C H A P. XXVI.

*Concerning the judgments in high treason
and the particulars relating thereunto,
and to attainders.*

THIS Chapter divides itself into these particulars :
1. Touching the person against whom the judgment is
to be given. 2. By whom it is to be given. 3. What the
form of the judgment is. 4. What the consequents thereof
are.

I. Touching the person, against whom a judgment in trea-
son is to be given.

In antient time, if a man had been slain in open war against
the king either in rebellion, or adhering to the king's enemies,
the king did *de facto* take a forfeiture, sometimes by present-
ment in *Eyre*, sometimes by presentment in the king's bench,
and sometimes by inquisition by the escheter : for this see
the whole pleading in the chancery, *Claus.* 29 E. 3. M. 2. & 4.
for the coheirs of *Robert de Ros* for the manor of *Werk*.

But in all other cases, whether of felony or treason, if the
party had died before attainder, tho he were kild in the
pursuit, *Claus.* 26 E. 3. m. 29. pro *Ricardo filio Adæ Peshall* ;
and H. 16 E. 1. Rot. 27. coram rege. *Suffex*, pro *Stephano Nor-*
thup' (a) M. 20 & 21 E. 1. Rot. 4. in dorſ. coram rege pro *Johanne*
de

(a) That case was thus : *Richard*
de Northup' de Estdene killed *Endo de*
Shelfhangre in the reign of *Henry III.*
for which murder he was indicted and
outlawed upon an exigent awarded a-
gainst him by the justices itinerant in
Suffex anno 55 H. 3. whereupon his lands
were seised, afterwards, viz. H. 16 E. 1.
Stephen, brother and heir of the said
Richard Northup', impleaded the chief
lord of the fee coram rege for his said

brother's lands, and alleged, quod præ-
dictus *Ricardus* obiit ante iter prædicto-
rum justiciariorum, & quod post mor-
tem suam positus fuit in exigendis ;
upon which point the parties joined is-
sue, and in the following *Easter-term*
anno 16 Edw. 1. venerunt juratores, qui
dicunt super sacramentum suum, quod
prædictus *Ricardus Northup'* de *Estdene*
obiit apud *Rotherfield* in comitatu
prædicto ante prædictum iter prædicto-
rum

de Bekingham (b), or tho he died after conviction and before judgment, 7 H. 4. 27. a. there ensued neither attainder nor forfeiture of lands.

But the law was practised antiently, and it seems continuing to this day, if a traitor or a felon rescue himself, or will not submit to be arrested and on resistance is slain, upon presentment thereof he shall forfeit his goods and chattles, 3 E. 3. Corone 290, 312. Co. P. C. p. 227. for if a person be arraigned for felony or treason, tho he be acquitted, yet if it be found he fled, he forfeits his goods, and this is but in nature of a presentment of *fugam fecit*.

But whether that presentment be traversable, *vide Stamf. P. C. Lib. III. cap. 21. (c)*

Yet the former practice by degrees grew out of use, for in 8 E. 3. 20. a. the judges would not allow an averment, that a party died in rebellion or adhering to the king's enemies, without a record of his conviction, for it is possible he might be there against his will.

But now by the statute of 25 E. 3. *de proditionibus*, which requires an attainder by conviction and attainder *per gentes de lour condition*, that attainder after death for adhering to the king's enemies is ousted.

And because it might be said, that an inquest before the escheter might satisfy those words, the statute of 34 E. 3. *cap. 12.*

rum justiciariorum: Et ideo consideratum est, quod predictus Stephanus recuperet seisinam suam de predictis terris, &c.

(b) This was in the county of Nottingham; Alan de Bekingham was appeal'd by Eve the wife of Peter de Dynyngton de morte predicti viri sui before special commissioners of oyer and terminer, upon which the said Alan was brought before them; and pleaded *se clericum esse, & non alibi quam in foro ecclesiastico inde posse aut debere respondere*; and thereupon the said justices proceeded *ex officio de morte predicta inquisitionem capere, & ipsum Alanum per inquisitionem illam culpabilem inde invenerunt, & talem ipsum prisonæ regis de Nottingham occasione mortis predictæ reponi præceperunt: Alan died in prison, and after his death the sheriff and*

coroners seized all his lands and tenements into the king's hands, *ac si idem Alanus de morte predicta convictus fuisset & judicium propter hoc subisset*; but upon a *monstravit* of John, son and heir of the said Alan, the matter came to be heard *coram rege*, and thereupon in Trinity-term following, anno 21 Ed. 1. " Rex ex gratia sua concedit, quod prædictus Johannes filius Alanus de Bekingham habeat seisinam de tenementis in manu domini regis existentibus, " salvo jure suo & hæredum suorum & " aliorum, cum inde loqui voluerint, " &c. Et ideo præceptum est vicecomiti, quod habere faciat predicto Johanni seisinam de predictis tenementis in forma predicta cum pertinentiis, &c.

(c) fol. 183. b.

cap. 12. hath in exprefs terms for the future ousted fuch attainders or convictions after the parties death, at leaft in other cafes than forfeitures of war, and except forfeitures of old times judged after the parties death by prefentment in *Eyre*, or in the king's bench, as of felons of themfelves; and therefore *Jack Cade*, who was flain in open rebellion, could not be attaint but by act of parliament, and fo it is recited in the act of his attainder 29 *H. 6. cap.* 1.

Yet after the ftatute of 34 *E. 3.* the earl of *Salisbury* and others, who confpired againft *Henry IV.* and levied war againft him, and in their flight were taken, had their heads ftricken off by thofe, that apprehended them, without any judgment given againft them, and after their death judgment of treason was given againft them by the king and lords in parliament, *Rot. Par. 2 H. 4. n. 30.* upon which the heir of the earl of *Salisbury* brought a petition of error, *Rot. Par. 2 H. 5. part. 1. m. 13.* and affigned for error among other errors, that his anceftor was dead at the time of the judgment given in parliament, but yet the judgment was affirmed; yet afterwards *Rot. Par. 9 H. 5. n. 19.* to avoid all queftions he was reftored by act of parliament.

Again, no man ought to be attainted of treason without being called to make his defence and put to answer, which is called *arrenatio* or *ad rationem pofitus*.

Claus. 1 E. 3. part. 1. m. 21. dorſ. *Thomas* earl of *Lancaster* was condemned to death, as a traitor by *Edward II.* at *Pontefract*, *Henry* his brother brought a petition of error in the parliament of 1 *E. 3.* upon that judgment, the record was removed in thefe words.

“ *Placita coronæ coram domino Edwardo rege filio domini*
 “ *regis Edwardi tenta in præſentiâ ipsius domini regis apud*
 “ *Pontem-fractum die lunæ proximè ante feſtum annuncia-*
 “ *tionis beatæ Mariæ virginis anno regni fui quintodecimo.*

“ *Cum Thomas comes Lancaſtriæ captus pro proditiõibus,*
 “ *homicidiis, incendiis, depredationibus, & aliis diverſis feloniis*
 “ *ductus eſſet coram ipſo domino rege, præſentibus Edmundo*
 “ *comite Kant', Johanne comite Richemund', Adomaro de Valen-*
 “ *ciâ comite Pembroch', Johanne de Warennâ com' Suri', Ed-*

“ mundo com’ *Arundell*, *David* com’ *Athol*, *Roberto* comite de
 “ *Anegos*, baronibus & aliis magnatibus regni, dominus rex
 “ recordatur, quod idem *Thomas* homo ligeus ipsius domini
 “ regis venit apud *Burton* super *Trentam* simul cum *Humfr’o*
 “ *de Bohun* nuper com’ *Heref’*, proditore regis & regni in-
 “ vento cum vexillis explicatis apud *Pontem Burgi* in bello
 “ contra dominum regem, & ibidem interfecto, & *Rogero*
 “ *Damory* proditore adjudicato, & quibusdam aliis proditori-
 “ bus & inimicis regis & regni cum vexillis explicatis, & ut de
 “ guerrâ hostiliter resistebat & impedivit ipsum dominum re-
 “ gem & homines & familiares suos per tres dies continuos,
 “ quo minus pontem dictæ villæ de *Burton* transire potue-
 “ runt, &c.---Et unde dominus rex, habito respectu ad tanta
 “ dicti *Thomæ* comitis facinora, & iniquitates ejus, & ejus
 “ maximam ingratitude, nullam habuit causam ad aliquam
 “ gratiam eidem *Thomæ* comiti de pœnis prædictis super ip-
 “ sum adjudicatis pardonand’ in præmissis faciend’, quia ta-
 “ men idem *Thomas* comes de parentelâ excellenti & nobilif-
 “ simâ procreatus est, dominus rex ob reverentiam dictæ pa-
 “ rentelæ remittit de gratiâ suâ speciali prædicto *Thomæ* co-
 “ miti executionem duarum pœnarum adjudicatarum, sicut
 “ prædictum est, scilicet quod idem *Thomas* comes non tra-
 “ hatur, neque suspendatur, sed quod executio tantummodo
 “ fiat super ipsum *Thomam* comitem, quod decapitetur.

“ Thereupon the record being read in præsentia domini re-
 “ gis, procerum & magnatum regni & aliorum in hoc parla-
 “ mento, he assigned these errors: 1. Quòd erratum est in hoc,
 “ quòd cum quicumque homo ligeus domini regis pro seditioni-
 “ bus, homicidiis, robberiis, incendiis & aliis feloniis tempore pa-
 “ cis captus, & in quâcunque curia regis ductus fuerit, de hu-
 “ jusmodi seditionibus & aliis feloniis sibi impositis, per legem
 “ & consuetudinem regni arrenari debet, & ad responsionem
 “ poni, & inde per legem &c. convinci, antequam fuerit
 “ morti adjudicatus; licet prædictus *Thomas* comes, homo li-
 “ geus prædicti domini regis patris, &c. tempore pacis cap-
 “ tus, & coram ipso rege ductus fuit, dictus dominus rex pa-
 “ ter, &c. recordabatur ipsum *Thomam* esse culpabilem de se-
 “ ditionibus & feloniis in prædictis recordo & processu con-

“ tentis, absque hoc, quod ipsum inde arrenavit seu ad re-
 “ sponzionem posuit, prout moris est secundum legem, &c.
 “ & sic absque arrenamento & responsione idem *Thomas* erro-
 “ nicè, & contra legem terræ tempore pacis morti extitit adju-
 “ dicatus, unde cum notorium sit & manifestum; quod totum
 “ tempus, quo impositum fuit eidem comiti prædicta mala &
 “ facinora in prædictis recordo & processu contenta fecisse,
 “ & etiam tempus, quo captus fuit, & quo dictus dominus
 “ rex pater recordabatur ipsum esse culpabilem, &c. & quo
 “ morti extitit adjudicatus, fuit tempus pacis, maximè cum
 “ per totum tempus prædictum cancellaria & aliæ placeæ cu-
 “ riæ domini regis apertæ fuerunt, & in quibus lex cuicun-
 “ que fiebat, prout fieri consuevit, nec idem dominus rex
 “ unquam in tempore illo cum vexillis explicatis equitabat,
 “ prædictus dominus rex pater, &c. in hujusmodi tempore
 “ pacis contra ipsum comitem sic recordari non debuit, nec
 “ ipsum sine arrenamento & responsione morti adjudicasse.
 “ Dicit etiam, 2. Quod erratum est in hoc, quod cum
 “ prædictus *Thomas* comes fuisset unus parium & magna-
 “ tum regni, & in Magnâ Cartâ de libertatibus *Angliæ* con-
 “ tineatur, quod nullus liber homo capiatur, imprisonetur, aut
 “ disseisnatus de libero tenemento suo, vel libertatibus, seu li-
 “ beris consuetudinibus suis, aut utlegetur, aut exulet, nec a-
 “ liquo modo destruatur, nec dominus rex super eum ibit, nec
 “ super eum mittet, nisi per legale iudicium parium suorum,
 “ vel per legem terræ, prædictus *Thomas* comes per recordum
 “ regis, ut prædictum est, tempore pacis erroneè morti fuit
 “ adjudicatus absque arrenamento seu responsione, seu le-
 “ gali iudicio parium suorum, contra legem, &c. & con-
 “ tra tenorem Magnæ Cartæ prædictæ: and therefore, as
 “ brother and heir of *Thomas*, prays, that the judgment
 “ be annulled, and he restored to his inheritance, & quia
 “ inspectis & plenius intellectis recordo & processu præ-
 “ dictis, &c. ob errores prædictos & alios in eisdem re-
 “ cordo & processu compertos consideratum est per ipsum
 “ dominum regem, proceres, magnates & totam communi-
 “ tatem regni in eodem parlamento, quod prædictum iudi-
 “ cium contra prædictum *Thomam* comitem redditum, tan-
 “ quam

“ quam erroneum, revocetur & annulletur, & quod præ-
 “ dictus *Henricus*, ut frater & hæres ejusdem *Thomæ* comitis,
 “ ad hæreditatem suam petendam & habend’ debito processu
 “ inde faciend’, prout moris est, admittatur, & habeat brevia
 “ cancellariæ, & quod justic’, in quorum placeis dicta recor-
 “ dum & processus irrotulantur, eadem recordum & pro-
 “ cessus irritari faciunt & annullari, &c. P. 15 E. 2. B. R.
Rot. 69. & Pasch. 39 E. 3. Rot. 49. coram Rege.

This notable record, even before the statute of 25 E. 3. gives us an account of these things: 1. That in time of peace no man ought to be adjudged to death for treason, or any other offense without being arraigned and put to answer. 2. That regularly, when the king’s courts are open, it is a time of peace in judgment of law. 3. That no man ought to be sentenced to death by the record of the king without his legal trial *per pares*. 4. That in this particular case the commons, as well as the king and lords, gave judgment of the reversal.

John Matravers was attainted of treason in the parliament of 4 E. 3. n. 3. for the death of the earl of *Kent*, as hath been before shewn, *cap. 11. p. 82.* in his absence, *Rot. Par. 21 E. 3. n. 65. dors.* the same *John Matravers* sued in parliament to reverse that judgment, and assigned for error, *qil est adjudge a mort in un parlement tenuis a Westminster en l’absence de lui, nient indite, nient arrayne, ne appell a respons, cointre le ley de realm & les usages approves*; he did not prevail in that parliament but *Rot. Par. 25 E. 3. n. 54 & 55.* he had a restitution by the king confirmed in parliament.

Roger Mortimer earl of *March* was condemned for treason for the death of king *Edward II.* *Rot. Par. 4 E. 3. n. 1.* his cousin and heir *Roger Mortimer*, *Rot. Par. 28 E. 3. n. 9 & 10.* brought a petition of error upon that judgment, whereupon the record of his attainder was removed into parliament, and there entred of record, and errors assigned; the judgment of reversal is thereupon given in this form.

“ Les queux record & judgment lues & examine in plein
 “ parlement le dit *Roger* cosin & heyre de dit counte dit &
 “ alledge, qe les record & judgment susdit sont erroynes &
 “ defective

“ defective in tous points, & noſinent en tant comẽ le dit
 “ counte eſtoit myſe a mort & diſherite ſans nul accuſement
 “ & ſans eſtre meſne en judgment, ou en reſpons, dont il
 “ prie, qe les record & judgment avant dits ſoient revers &
 “ adnulls, & ſur ceo ove bone deliberation ed aviſe ed grant
 “ leiſure per noſtre dit ſeigneur le roy, prelates, prince, &
 “ ducs, countes, & barons avant dit, il peirt clerement, qe
 “ meſmes les judgment & records ſont erroynes & defectives
 “ en tous points, par quoi noſtre dit ſeigneur le roy & les
 “ dits prelates, prince, ducs, countes, & barons par accord
 “ des chivalers des countes & des commons repellent, &
 “ anyentiffent, & pur erroyn & irrit adjuggent les records &
 “ judgment ſuſdits,” and reſtore *Roger* the petitioner to the
 title of earl of *March*, and to the lands, &c. of his grand-
 father.

But if the party accuſed declined his appearance, it is true then, that the law of the land is, that he ſhould be proceeded againſt to an outlawry, and may thereby be attainted by proceſs of outlawry without anſwer, for he declines it by his own default.

And ſometimes there was a more compendious way, namely, the iſſuing of a proclamation-writ to appear in a month, two, or three in the court of king’s bench, or that in default thereof the party ſhould be attainted of treaſon or ſuch other offense, wherewith he was charged; and this was frequently done by act of parliament in particular caſes, not unlike the proceſs enacted in caſe of an aſſault upon a member of parliament by the ſtatute of 5 *H. 4. cap. 6.* and 11 *H. 6. cap. 11.*

Sometimes the lords houſe did make ſuch a direction, as in the caſe of *Talbot*, *Rot. Par. 17 R. 2.* mentiond before, *p. 265.* but it could not be effectual to attain the party upon his default of appearance upon the return of proclamation without act of parliament, or proceſs of outlawry.

Again, as a man could not be attainted of treaſon without arraignment, if preſent, or proceſs of outlawry, if abſent, ſo neither could he be arraigned without an accuſation; and this accuſation was of three kinds: 1. If he were taken with the *mainouer*. 2. By way of appeal. 3. By way of indictment.

1. In antient time, sometimes as well in case of treason, as in case of felony a man, that was taken *cum manu opere*, was thereupon arraigned, an instance we have thereof, *T. 10 E. 2. Rot. 132. Bucks* cited before *p. 126.*

But this is wholly disused and ousted by the statutes of *5 E. 3. cap. 9.* and *25 E. 3. cap. 4.* by which statutes none shall be put to answer without indictment or presentment of good and lawful men of the neighbourhood.

2. By appeal, and this was usual at common law, as appears by *Britton, cap. 22.* but this kind of proceeding by appeal in the king's ordinary courts in cases of treason hath been long disused, and it seems is wholly taken away by the statutes of *5 and 25 E. 3.* above-mentiond.

But yet notwithstanding that courie of appeal continued still in parliament, as appears by several instances, especially in the great appeal of treason by the lords appellants in *11 and 21 R. 2. (d)*, but by the statute of *1 H. 4. cap. 14.* all appeals in parliament are wholly taken away, and accordingly upon reference to the judges upon the impeachment made in the lord's house by the earl of *Bristol* against the earl of *Clarendon* in the present parliament, it was resolved and reported by all the judges. *(e)*

But yet that statute hath not taken away impeachments by the house of commons in cases of treason or other misdemeanors, and therefore tho since *1 H. 4. cap. 14.* all appeals of treason by particular persons are taken away, and have been wholly disused, yet impeachments by the commons have been ever since very frequently used, because they are rather in the nature of grand indictments, than appeals.

3. By way of indictment, this is the regular and legal way of proceeding in case of treason.

And thus far for the persons against whom judgment of treason may be given, and the manner of deducing them unto judgment.

II. As touching the persons, by whom judgment of treason may be given; this concerns more especially the jurisdiction of courts: a word touching it.

4 U

I: Justices

(d) State Tr. Vol. I. p. 4.

(e) State Tr. Vol. II. p. 552.

1. Justices of peace cannot regularly arraign, try or give judgment in case of treason, unless in such cases, as are by special act of parliament committed to their cognizance, as 26 H. 8. cap. 6. 5 Eliz. cap. 1. 13 Eliz. cap. 2. 23 Eliz. cap. 1. and some others, because their commission extends not to it, yet they may take examinations touching treason in order to the discovery thereof and preservation of the peace.

2. Justices of *oyer and terminer* may give judgment in case of high treason, for it is expressly within their commission.

3. Justices of gaol-delivery may give judgment in case of treason on any person in prison before them, and that is proved by the statute of 1 E. 6. cap. 7. and by the constant practice.

4. Justices of *Nisi prius* may give judgment in case of treason by the statute of 14 H. 6. cap. 1. but *quære*, whether it be barely by force of that commission, or whether it must be by virtue of some other commission.

5. Justices of the king's bench in the court of king's bench may give judgment in case of treason, for it is the highest court of ordinary justice, especially in criminals.

6. If a peer be indicted and plead not guilty to his indictment, and is tried by his peers and found guilty, the lord steward commissioned by the king for that office gives the judgment, and orders execution.

7. If a peer be tried in parliament by the lords, they usually elect a person to be lord steward to gather up their votes and pronounce the judgment, but for the most part that steward so elected, tho in parliament, is commissioned by the king under his great seal; but of this more hereafter.

III. I come to the form of the judgment.

The judgments in case of treason are of two kinds, *viz.* the solemn and severe judgment, and the less.

The solemn or severe judgment against a man convict of high treason is set down, Co. P. C. p. 210. *Stamf. Lib. III. cap. 19. (f)*, 1 H. 7. 24. a. *Stafford's case & alibi*, "Et super hoc visis & per curiam hic intellectis omnibus & singulis præmissis consideratum est, 1. Quod prædictus R. usque fur-

“ cas *T.* trahatur. 2. *Ibidem* suspendatur per collum, & vi-
 “ vus ad terram prosteratur. 3. Interiora sua extra ven-
 “ trem suum capiantur. 4. *Ipsaque* vivente (*g*) comburantur,
 “ & 5. Caput suum amputetur. 6. Quodque corpus suum
 “ in quatuor partes dividatur. 7. Et quod caput & quarteria
 “ illa ponantur, ubi dominus rex ea assignare voluerit.

The king may and often doth discharge or pardon all the punishment, except beheading, and in as much as that is part of this judgment, it may be executed by the king's special command, tho the rest be omitted.

In the case of a woman her judgment is to be drawn and burnt, as well in high treason, as petit treason; and she is neither hanged nor beheaded.

The less solemn judgment is only *to be drawn and hanged*, and this is regularly the judgment in case of counterfeiting the coin of this kingdom, for that was the judgment in that case at common law, which was not altered by the statute of 25 *E. 3.* viz. “ *Super quo visis, &c. consideratum est, quod B:*
 “ *usque furcas de T. trahatur, & ibidem suspendatur per col-*
 “ *lum, quousque mortuus fuerit.*

But the judgment in that case also for a woman is to be drawn and burnt, 25 *E. 3.* 85. *b.*

And it seems the same judgment was also for importing counterfeit coin, and yet that was not treason at common law.

And the same judgment was for counterfeiting the great or privy seal at common law, as may be easily gathered out of *Braeton, Lib. III. de Corona, cap. 3.* but expressly by *Fleta, Lib. I. cap. 22. Crimen falsi dicitur, cum quis accusatus fuerit, quod sigillum regis, vel appellatus, quod sigillum domini sui de cuius familia fuerit, falsaverit, & brevia inde consignaverit, vel cartam aliquam vel literam ad exheredationem domini vel alterius damnum sic sigillaverit, & quibus casibus, si quis inde convictus fuerit, detractari meruit & suspendi.*

And accordingly the like judgment hath been given, as in case of petit treason, for counterfeiting the great seal after
 the

(*g*) These words are so material, that them in the case of *Walcot, 35 Car. 2.*
 the judgment was reversed for want of *Show. Ca. Parl. 127. 1 Salk. 632.*

the statute of 25 E. 3. as appears by 2 H. 4. 25. and the record is accordingly (b); and tho it is true my lord *Coke* saith, it is a mistake *Co. P. C. p. 15.* yet I rather think it was a mistake in my lord *Coke*, and that the judgment may be given either way, *viz. distrabatur & suspendatur*; or *distrabatur, suspendatur & decapitetur.*

In the case (i) 16 *Jac.* for counterfeiting the privy signet, which was made treason by the statute of 1 *Mar. cap. 6.* the judgment was the great and solemn judgment of drawing, hanging and quartering.

But suppose the judgment were so in case of counterfeiting the seal, great or privy, yet the question is whether the same judgment must be in those new treasons enacted by 1 & 2 *P. & M. cap. 11.* for counterfeiting forein coin made current by proclamation, and also upon the statutes of 5 *Eliz.* and 18 *Eliz.* for clipping and washing, whether must they have the solemn judgment to be hanged and quartered, or only the judgment of petit treason to be drawn and hanged.

And herein by *Stamf. Lib. III. cap. 19. (k)*, and *Co. P. C. p. 17.* the judgment is to be the solemn judgment, and not the judgment to be drawn and hanged, because it is a new treason made by act of parliament, and therefore must have the solemnity of the great judgment in case of high treason.

And surely this is regularly true, and therefore in the case of popish priests, and those other acts of treason newly enacted in the queen's time, the judgment is to be drawn, hanged and quartered; but it seems to me, that the law is otherwise in relation to those new treasons enacted in the time of queen *Mary* and queen *Elizabeth* relating to coin, and that in all those cases the judgment at least may be only to be drawn and hanged; and my reasons are, 1. Because they are *in cognata materia falsificationis monetæ*, and therefore tho they are made treason, yet they are within the verge of the crime of falsification of money, and are to be under the same punishment. 2. It were unreasonable to think, that the parliament should make the counterfeiting of forein coin to have a greater kind of punishment, than the counterfeiting of the
1
coin

(b) *Vide supra in votis p. 181.* (i) *Robinson's case, 2 Rol. Rep. 50.* (k) *p. 182. b.*

coin of this kingdom, or that clipping *Engliſh* or forein coin ſhould have a greater puniſhment, than counterfeiting of the coin of this kingdom. 3. As the ſtatute of 25 E. 3. tho it declare as well counterfeiting of money as levying of war to be high treason, yet leaves them under the ſeveral degrees of puniſhments proportionable to their nature, and what they had before, ſo tho theſe ſtatutes make thoſe to be new treaſons, that were not before, yet in as much as the puniſhments of treaſons were not equal, but that concerning coin was a puniſhment of a lower allay, therefore the ſubject matter of thoſe acts ſhall govern the degree of their puniſhment according to that puniſhment of treason, that relates to coin. 4. And accordingly in the book of *T. 6 Eliz. Dy. 230. b.* it is agreed by the juſtices, that the puniſhment *pro tonſurâ moneta* is only to be drawn and hanged, and upon a ſtrict ſearch into the precedents of *Newgate* from 5 *Eliz.* downwards, tho ſome judgments for clipping be the ſolemn judgments, yet the moſt and lateſt are only to be drawn and hanged, and accordingly it was reſolved and done upon great deliberation lately in the king's bench upon the conviction of two *Frenchmen* for clipping of the king's coin. (1)

But however it ſeems, that the judgment either of one kind or the other ſeems not to be erroneous, for hanging and drawing is part of the ſolemn judgment, and tho either may be perchance warrantable enough, yet certainly the judgment of petit treason in all treaſons touching coin is the moſt warrantable and ſafe.

IV. I come to conſider of the conſequents of a judgment in treason.

If the judgment be given by him, that hath authority, and it be erroneous, it was at common law reverſible by writ of error; only the ſtatute of 29 *Eliz. cap. 2.* ſecures all former attainders, where the party is executed, from reverſal by writ of error, but meddles not with other attainders, neither doth the ſtatute of 33 *H. 8. cap. 20.* take away writs of error upon attainder of treason, as hath been reſolved againſt the opinion of *Stamf. P. C. Lib. III. cap. 19. (m)*, *Co. P. C. p. 31.*

4 X

But

(1) The caſe of *Bellew* and *Norman*, *Raynt. 234. 1 Ventr. 234.* (m) p. 182. b.

But it is true, that the statutes of 26 H. 8. cap. 13. and 5 & 6 E. 6. cap. 11. take away from a person outlawed in treason the advantage of reversal of an outlawry, *because the party outlawed was out of the realm*, but extends not to other offenses.

The consequents of a judgment in treason are; 1. Corruption of blood of the party attaint. 2. Loss of dower to his wife. 3. Forfeiture to the king of all his lands, goods and chattles. 4. Execution, whereof in the next chapter.

C H A P. XXVII.

Touching corruption of blood and restitutions thereof, loss of dower, forfeiture of goods, and execution.

THE Consequence of the judgment in high treason, petit treason, or felony, is corruption of blood of the party attaint; unless it be in such special treasons or felonies enacted by parliament, wherein it is especially provided, that the attainder thereof shall make no corruption of blood, as upon the statutes of 5 and 13 *Eliz.* in treason for clipping and washing of coin; and upon the statutes of 21 *Jac.* cap. 26. for acknowledging a recognizance, &c. in another's name, 1 *Jac.* cap. 11. for bigamy, and many others.

If a man be attaint of piracy before commissioners of *oyer and terminer* grounded upon the statute 28 H. 8. cap. 15. by indictment and verdict of twelve men according to the course of the common law, he forfeits his lands and goods by the statute of 28 H. 8. cap. 15. but this works no corruption of blood, because it is an offense, whereof the common law

takes no notice, and tho it be enacted, they shall suffer and forfeit as in case of felony, yet it alters not the offense, *Co. P. C. cap. 49. p. 112. vide tamen contra Co. Litt. §. 745. p. 391.*

If a man be attainted before the admiral of treason or felony committed upon the sea, or before the constable and marshal for treason or murder committed beyond the sea, according to the course of the civil law, it works no corruption of blood, for tho these offenses within the cognizance of the common law are felonies or treasons, yet the manner of the trial being according to the course of the civil law, the judgment thereupon, tho capital, corrupts not the blood.

If there be an attainder of treason or felony done upon the sea upon this statute of 28 *H. 8.* by jury, according to the course of the common law, it seems that the judgment thereupon works a corruption of blood, because the commission itself is under the great seal warranted by act of parliament, and the trial is according to the course of the common law, and therefore the proceeding and judgment thereupon is of the same effect, as an attainder of forein treason by commission upon the statute of 35 *H. 8. cap. 2.* or any other attainder by course of the common law, and with this agrees *Co. Litt. §. 745. p. 391.* nay, I think farther, that if the indictment of piracy before such commissioners upon the statute of 28 *H. 8.* be formed as an indictment of robbery at common law, *viz. vi & armis & felonice, &c.* that he might be thereupon attainted, and the blood corrupted; for whatever any say to the contrary, it is out of question, that piracy upon the statute is robbery, and the offenders have been indicted, convicted, and executed for it in the king's bench, as for a robbery, as I have elsewhere made it evident.

But indeed, if the indictment before these commissioners run only according to the style of the civil law, *viz. piratice deprædavit,* then the attainder thereupon upon the statute of 28 *H. 8.* tho it gives the forfeiture of lands and goods, corrupts not the blood, and so are those two books of the same author, *Co. P. C. cap. 49.* and *Co. Litt. §. 745.* to be reconciled, which without this diversity would be contradictory: *vide H. 13 Car. B. R. Hilliar & Moore.*

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By the statute of *Westminster 2. de donis conditionalibus*, if tenant in tail be attaint of felony or treason, there is no corruption of blood wrought as to the issue in tail, because the very blood, as well as the land, is entailed, and yet for the advantage of the issue there is a corruption of blood, as if the tenant in tail alien with warranty and assents, and then is attainted, the lien of the warranty is gone, for that lien was not entailed. *Litt.* §. 747. but if the warranty were annexed to the gift in tail, the attainder of the donee doth not destroy the warranty to the issue, for the warranty is entailed.

The statutes of 26 and 33 *H. 8.* subject estates-tail to forfeiture by attainder of treason, and so the law stands at this day notwithstanding the statutes of 1 *E. 6.* and 1 *Mar.* whereof before.

But yet these acts are not absolutely a repeal of the statute of *donis conditionalibus*, for notwithstanding the forfeiture of the lands entailed by the attainder, yet the blood is not corrupted as to the issue in tail.

And therefore if the son of the donee in tail be attainted of treason in the life of the father, and die having issue, and then the father dies, the estate shall descend to the grandchild, notwithstanding the father's attainder; but otherwise it would have been in case of a fee-simple. 3 *Co. Rep. Dowrie's case*, 10. *b.*

In all cases (but only in cases of entails as before) attainder of treason or felony corrupts the blood upward and downward, so that no person, that must make his derivation of descent to or through the party attaint, can inherit, as if there be grandfather, father and son, the father is attainted, and dies in the life of the grandfather, the son cannot inherit the grandfather. (*a*)

In cases of collateral descents of lands in fee-simple, if there be father and two sons, and the eldest is attainted in the life of the father, and dies without issue in the life of the father, the younger son shall inherit the father, for he needs not mention his elder brother in the conveying of his title; but if the elder son attaint survive the father but a day, and

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(a) *Dyer* 274.

die without issue, the second son cannot inherit, but the land shall eschete *pro defectu heredis*, for the corruption of blood in the elder son surviving the father impedes the descent.

31 E. 1. *Barr*, 315.

But otherwise it is in case the eldest son had been an *alien nee*, for then notwithstanding such son alien were living, the land will descend from the father to the youngest son born a denizen.

If a man hath two sons and then is attaint of treason or felony, the elder son purchaseth land and dies without issue, either in the life-time or after the death of the father, the attainder of the father is no impediment of the descent from the brother to the brother. Sir *Philip Hobby's* case, *Co. Litt.* 8.

And the same law is in case the father were first attaint, and then had issue two sons, the elder purchases lands in fee-simple and dies without issue, the younger shall inherit, for tho both derive their blood from the father, yet the descent from the brother to the brother is immediate, and is not impeached by the attainder of the father, this tho made a doubt, *Co. Litt.* p. 8. yet was agreed generally by the judges in the exchequer-chamber in the case of the earl of *Holderness*. (b)

But if there be two brothers, the elder is attaint and have issue, and dies in the life of the younger, and then the younger die without issue, the lands in fee-simple of the younger shall not descend to the nephew, for the attainder of his father is an impediment to the derivation of his descent.

And accordingly it is, if the son of the person attaint purchase land and die without issue, it shall not descend to his uncle, for the attainder of his father corrupted his blood, whereby the bridge is broken between the nephew and uncle, and the one cannot inherit the other, but the land shall eschete *pro defectu heredis*: *vide accordant* ruled in *Courtney's* case *infra Co. P. C.* p. 241.

Thus far for corruption of blood.

(b) *P. 16 Cur. 2.* reported by the name of *Collingwood* and *Pace*, 1 *Sid.* 195. 1 *Ven.* 415.

Touching restitutions in blood they are of two kinds, by pardon, and by act of parliament.

The king's pardon, tho it doth not restore the blood, yet as to issues born after it hath the effect of a restitution.

A. hath issue *B.* a son, and then is attaint of treason or felony, and then is pardoned and purchaseth land in fee-simple, and then hath issue *C.* if *A.* dies, and *B.* survives, and after dies without issue, yet the land shall eschete *pro defectu heredis*, for the pardon restores not the blood between *A.* and *B.* that was born before; but if *B.* had died without issue in the life of *A.* and then *A.* had died, the land should descend to *C.* because he was not in being while his father's attainder stood in force, but was born after the purging of the crime and punishment by the pardon. *Co. Litt.* §. 747.

But restitution of blood in its true nature and extent can only be by act of parliament.

Restitutions by parliament are of two kinds, one a restitution only in blood, which only removes the corruption thereof, but restores not to the party attaint or his heirs the manors or honours lost by the attainder, unless it specially extend to it; the other is a general restitution not only in blood, but to the lands, &c. of the party attaint.

A restitution in blood may be special and qualified, but generally a restitution in blood is construed liberally and extensively.

A. hath issue *B.* a son, and is attaint of treason and dies, *B.* purchaseth land in fee-simple, *B.* by parliament is restored only in blood, and enabled as well as heir to *A.* as to all other collateral and lineal ancestors, provided it shall not restore *B.* to any of the lands of *A.* forfeited by the attainder, *B.* dies without issue; it was ruled, that the lands of *B.* shall descend to the sisters of *A.* as aunts and collateral heirs of *B.*

1. Because the corruption of blood by the attainder is removed by the restitution. 2. Altho the words of the act of restitution be to restore *B.* only as heir to *A.* &c. yet this doth not only remove the corruption of blood, and restore him and his lineal heirs in blood, but also his collateral heirs, and removes
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that impediment, which would have hindred the descent to them. *Co. P. C. cap. 106. Courtney's case.*

It appears *Rot. Parl. 25 E. 3. n. 54, 55.* that *John Matravers*, that was attainted of treason in 4 E. 3. obtained letters patent from the king of restitution in blood, but it was not effectual, and therefore there is enacted a general restitution as well in blood, as to his land by a charter enacted and confirmed in parliament, namely by the king with the consent of the lords at the petition of the commons.

II. As to the second matter, namely the forfeiture of the wife's dower.

At common law the husband being attainted of treason or felony the wife should lose her dower, tho it were dower assigned *ad ostium ecclesie* or *ex assensu patris*, *Co. Litt. §. 41. p. 37. ibidem §. 747.* but not upon attainder of misprision of treason; but by the statute of 1 E. 6. *cap. 12.* and 5 E. 6. *cap. 11.* tho her husband be attainted of felony or murder, she shall not lose her dower.

But by attainder of her husband of high treason or petit treason the wife shall lose her dower at this day, unless in case of attainders of such treasons, where by special provision of parliament the wife's dower is saved, as upon the statutes of 5 and 18 *Eliz.* touching coin.

But if the husband seized in right of the wife hath issue by her, and then the wife commits treason, and is attainted and dies, it seems the husband shall be tenant by the courtesy, otherwise it were, if the treason were committed before issue had: *vide Co. Litt. §. 35.*

III. As to the third thing, namely the forfeitures, that happen by attainder, they are of these kinds, of lands, or of goods and chattles, or of dignities and honours.

1. As to the forfeiture of lands, generally the lands of all persons attainted of treason belong to the king, but by special privilege they may belong to a subject; as in case of the bishop of *Durham*, *&c. de quo supra p. 254, &c.*

If at common law tenant in tail were attainted of treason, or at this day be attainted of felony, tho the inheritance neither eschete nor be forfeited, yet the king hath (upon of-
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fiſe found) the freehold during the life of the tenant in tail, and not barely a pernaney of profits: adjudged T. 29 *Eliz.* *Clenche's rep. Venable's caſe*, and 3 *Leon. n. 236.* (c) *Co. Litt.* §. 747. and the ſame law it is for tenant of life attaint.

But an attainder of treaſon or felony of a copyholder gives the king no forfeiture, but regularly it belongs to the lord, unleſs ſpecial cuſtom be to the contrary.

By the cuſtom of *Kent*, if the anceſtors be attaint of felony and executed, yet his lands ſhall not eſchete but deſcend to the heir; but if he be attaint by outlawry, or abjure, they are not privileged by the cuſtom from eſchete.

But if he be any way attaint of treaſon, yet the forfeiture thereof belongs to the king notwithstanding that cuſtom. 8 *E. 2. Preſcription* 50. *Lambert's Perambulatio Kantie*, p. 551.

If the tenant hold lands of a common perſon, and commit treaſon and be attaint, yet the forfeiture belongs to the king of common right, as a royal eſchete; but if ſuch perſon commit felony or petit treaſon and be attaint, the lands eſchete to the lord, of whom they were immediately held, only the king ſhall have the year, day, and waſte of the tenement ſo eſcheted for felony or petit treaſon. *Stamf. Prærogativa Regis*, cap. 16. (d)

The commencement of this year and day is neither from the attainder nor from the death of the party attaint, but from the time of the inquisition found, tho the ſame be not found for many years after the death of the perſon attaint. 49 *E. 3.* 11.

If tenant in tail or for life, or the huſband ſeiſed in right of his wife be attaint of felony, the king ſhall have the year, day and waſte againſt the wife, the iſſue in tail, and him in reverſion. *Stamf. P. C. Lib. III. cap. 30.* (e), 3 *E. 3. Coro.* 327. but of this more hereafter.

The relation of the forfeiture or eſchete of lands for treaſon or felony to avoid all meſne incumbrances is to the time of the offence committed.

A. and *B.* jointenants in fee, *A.* is attaint of treaſon or felony and dies, the land ſurvives to *B.* but yet ſubject to the title

title of the forfeiture. *H. 10 Car. Rot. 342. B. R. Harrison and Walden.*

If a man seised in fee alien, and then be attaint of treason or felony by confession or abjuration upon an indictment supposing the felony committed before the alienation, the alienee may not only falsify the attainder in the point of the time of the felony supposed, but also in the very point of the felony or treason itself, and is not concluded by the confession of the alienor, tho the alienor himself be concluded. 49 E. 3. 11. 7 E. 4. 1. *Co. P. C. cap. 104. p. 231.*

But if he be attaint of felony or treason by verdict upon an indictment, supposing the offense before the alienation, tho the alienee cannot falsify the attainder by supposing there was no felony committed, yet he may falsify it as to the point of time, *viz.* he may allege contrary to the indictment, that the felony or treason was committed after the alienation, and not before, *Co. P. C. ubi supra 32 Eliz. Syer's case.*

If a man be indicted of a felony or treason supposed the 1st of *April 24 Car.* and in truth it was committed 1 *Junii 24 Car.* yet he shall be convicted notwithstanding that variance, for the day is not material; yet in such case for the avoiding of the danger and trouble, that may ensue by the relation of such attainder to the day mentioned in the indictment, it is fit for the jury to find the true day: *vide Syer's case, ubi supra.*

If a man be outlawed upon an indictment of felony or treason, and pending the process he alien the land, yet the king or lord shall have the land, which he held at the time of the felony committed, for the indictment contains the year and day, when it was done, unto which the attainder by outlawry relates.

But if a man sue an appeal by writ of felony or murder, and pending it the party aliens, and then is outlawed before appearance, the lords eschete is lost, because it relates only to the time of the outlawry pronounced, in as much as the writ of appeal is general, and contains no certain time of the offense committed, cited to be adjudged 5 E. 6. *Co. Litt. §. 4. fol. 13. a.*

But it seems, that if the defendant had appeared and the plaintiff had declared upon his writ, and the defendant had been convict and attain by verdict or confession, or if the appeal had been by bill, and thereupon the party had been outlawed, tho before appearance, the eschete had related to the time of the fact committed to avoid mesne incumbrances, for in the declaration in the one case, and in the bill in the other case, the year and day of the felony is set forth.

Touching forfeiture of goods.

The goods of a person convict of felony or treason, or put in exigent for the same, or that fled for these offenses, or that stands mute, are forfeit to the king.

But the relation of these forfeitures refer not to the time of the offense committed nor to the time of the flight, but only to the conviction or to the time presented, or to the time of the exigent awarded.

And therefore an alienation made by the felon or traitor, or person flying *bonâ fide* and without fraud, mesne between the offense or the flight, and the conviction or presentment of the flight is good, and binds the king, but if fraudulent, then it is avoidable by the statute of 13 *Eliz. cap. 5.* 3 *E. 3. Coron. 296. ibidem 344.*

If a man commit a felony and be pursued, and in the flight be killed, whereby he can neither be indicted nor convict, yet if this matter be found by inquisition before the justices in *eyre* or of *oyer* and *terminer*, he shall forfeit the goods he had at the time of the flight, and not those only, which were his at the time of the inquisition found, for there it must relate to the flight, because the party is dead, and can be no farther proceeded against, 3 *E. 3. Coron. 290, 312.*

If a party be acquitted of treason or felony, the jury that acquits him ought to enquire of his flight for it, and if they find he fled, what goods he had, for his goods and chattles are thereby forfeited; but this is but an inquest of office, and therefore is traversable by the party: *vide Stamf. P. C. Lib. III. cap. 21. (f)*

But upon an inquisition before the coroner of the death of a man *super visum corporis*, tho the party accused be acquitted, yet if it be presented, that he fled for it, it is doubted whether that inquisition as to the flight be traversable: *vide Stamf. P. C. Lib. III. cap. 21.*

But on all hands it is agreed, that if the coroner upon the inquest *super visum corporis* present one as guilty, and that he fled for it, and the party is arraigned and found not guilty, and also that he did not fly, yet that doth not avoid the first inquisition as to the flight, but the best shall be taken for the king, tho both are in the nature of inquests of office. 22 *Aff.* 96. *Forfeitures* 27. 3 *E.* 4. *Forfeitures* 35. *H.* 13 *H.* 4. *Forfeitures* 32. 7 *Eliz. Dy.* 238. *b.*

A *fugam fecit* by the principal or accessary before in murder, if the fact be presented before the coroner, entitles the king to the goods of the offender, for these are within the cognizance of the coroner, but the coroner hath no power to enquire of accessaries after, nor consequently of their flight, and therefore a presentment before the coroner of the flight of an accessary after gives the king no title to the goods. 4 *H.* 7. 18.

The usage was always upon a presentment of homicide before the coroner, or of flight for the same, or upon a conviction of felony by the petit jury, or the finding of a flight for the same, to charge the inquest or jury to enquire, what goods and chattels he hath, and where they are, and thereupon to charge the *Villata* where such goods are with the goods to be answerable to the king: *vide* 3 *E.* 3. *Corone* 296. & *alibi*, *vide* statute 31 *E.* 3. *cap.* 3.

But tho goods of an offender be not forfeited till the conviction or flight found by inquest, yet whether they may be seized upon the offense committed, hath been controverted.

1. It seems clear, that at common law if a man had committed felony or treason, or tho possibly he had committed none, yet if he had been indicted or appeal'd by an approver, the sheriff, coroner, or other officer could not seize and carry away the goods of the offender or party accused.

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2. Again, he could not in that case have removed the goods out of the custody of the offender or party accused, and deliver them over to the constables or to the *Villata* to answer for them. 13 *H.* 4. 13.

3. But if the party were indicted or appeal'd by an approver, the sheriff, or other officer might make a simple seizure of them only to inventory and appraise them, and leave them in the custody of the servants or bailiff of the party indicted, in case he would give security against their being imbezzled, or in default thereof he might deliver them to the constable or *Villata* to be answerable for them, but yet so that the party accused and his family have sufficient out of them for their livelihood and maintenance (*g*), *viz.* *Salvis capto & familie sue necessariis estoveriis suis, & si captus convictus fuerit de feloniam unde rettatus est, residuum bonorum ultra estoverium illud regi remaneat.* *Braët. Lib. III.* 123. *Fleta, Lib. I. cap.* 26. 43 *E.* 3. 24. 44 *Aff.* 14. *Stamf. P. C. Lib. III. cap.* 32. *Co. P. C.* 228, 229.

4. And possibly the same law was, tho he were not indicted or appeal'd, but *de facto* had committed a felony, but with this difference, if he had been indicted or appeal'd by an approver, this kind of seizure might have been made, whether he committed the felony or not; for in the books of 43 *E.* 3. and 44 *Aff.* there is no averment, that the felony was committed, but only that he was thus *accused* of record, and so is the book of 13 *H.* 4. 13.

But in case there were no indictment, then it is at the peril of him that seizeth, if he committed not the felony, and therefore it is issuable.

Now touching alterations by the statutes after made.

It seems, that by the statute of 5 *E.* 3. *cap.* 9. and the ensuing statutes, whereby it is enacted, that no man's goods shall be seized into the king's hands without indictment or due process of law, that it was held, that this kind of seizure of the goods of a person accused of felony, tho it be only *in custodiam & causa rei servandæ*, hath been held unlawful, if the person were not first indicted, or at least appeal'd by an

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approver;

(2) See *State Tr.* Vol. IV. p. 615. Sir *W. Parkins's* case.

approver; and so the books seem to import of 43 E. 3. 24. and 13 H. 4. 13. and expressly my lord Coke, P. C. cap. 103. p. 228.

By the statute of 25 E. 3. cap. 14. where a party is indicted of felony, the process directed by that statute is first a *capias*, and if he be not found a second *capias* together with a precept to seize his goods, and if he be not found then, an exigent and the goods to be forfeit.

And this is more than a simple seizure, such as was before at common law, for if the party came not in, his goods are forfeit upon the award of the exigent; and if he came in, tho his goods be saved, yet there is no direction for delivering his goods upon security; but it seems the sheriff is to take them into his custody, and yet out of them must allow sufficient for the sustenance of the prisoner and his family.

Quere, whether in the case of such a seizure a sale for a valuable consideration before conviction and after seizure do not bind the king, as it seems it doth in a case of seizure and delivery to the *Villata*: *vide* 2 Co. Rep. 171. *Fleetwood's* case.

This statute extends as well to treason as to felony, and yet it mentions only felony, and therefore at this day the exigent goes out upon the second *Capias* returned *non inventus*, as well in treason, as felony.

By the statute of 1 R. 3. cap. 3. it is enacted, “ That neither sheriff, &c. nor other person take or seize the goods
“ of any person arrested or imprisoned before he be convicted
“ of the felony according to the law of *England*, or before
“ the goods be otherwise lawfully forfeited, upon pain of
“ forfeiting the double value of the goods so taken.

Mr. *Stamford* thinks this is but in affirmance of the common law, only that it gives a penalty, but it seems to be somewhat more than so, for this prohibits the seizure of the goods of a party imprisoned, tho he were also indicted, but not yet convicted, where unquestionably the common law allowed such a seizure, as is before declared, if the party or his friends did not secure the forth-coming of the goods, where the party was indicted.

But upon this statute these things are considerable.

1. Whether it extend to treason; it seems it doth, for as all treason is felony and more, so in a statute of this nature for advancing of justice it seems comprised in it, for it is within the reason of the law, and *vide Co. P. C. p. 228.* tho I know it was otherwise held, or at least doubted in the case of Sir *Henry Vane*, whose rents were stopt in the tenants hands, and no precept was granted for their delivery, tho before conviction, yea and before the indictment, tho after imprisonment 1661.

2. Whether it extend to a party, that is at large and out of prison, whether indicted or not indicted, and as to that, 1. It seems clearly, that it doth not repeal the statute of 25 *E. 3. cap. 14.* touching the second *Capias* with a seizure of goods. But 2. As to other persons, that are at large and not indicted, nor process, as before, made upon their indictment, it seems to me, that if they fly not, there can be no seizure at all made, whether they are indicted or not, for the statute did not intend a greater privilege to a party imprisoned for an offense of this nature, than he that is at large. 3. That if he be at large and fly for it, yet his goods cannot be seized and removed, whether he be indicted or not indicted. 4. That if he be indicted and at large, yet the goods cannot be removed, but only viewed, appraised, and inventoried in the house or place, where they lie. 5. That altho the goods may not be removed, because the statute now hath taken away that removal, that was in some cases at common law, yet neither in case of treason nor in case of felony, where the party is at large, is it within the penalty of the statute as to the point of forfeiture of the double value, for as to that the statute is penal, but it is within the directive and prohibitory part of the statute, which by an equal construction and interpretation prohibits the thing to be practised, and hath altered the law as to the removing of the goods of the party before conviction.

And yet I know not how it comes to pass, the use of seizing of the goods of persons accused of felony, tho imprisoned or not imprisoned, hath so far obtained notwithstanding this statute, that it passeth for law and common practice as well by constables,

sheriffs and other the king's officers, as by lords of franchises, that there is nothing more usual: *vide Dalton's Justice of Peace, cap. 110.* (b) in affirmation of it, *viz.* that the officer may still take surety, that the goods be not embezzled, and for want of sureties may seize and praise them, and then deliver them to the town safely to be kept, until the prisoner be convicted or acquitted, and cites for it *Stamf. 192. 8 Rep. 171.* and *B. Forfeiture 44.*

It seems the opinion therefore of my lord Coke, *P. C. cap. 103.* hath truly stated the law, at least as it stands upon the statute of 1 R. 3.

1. That before the indictment the goods of any person cannot be searched, inventoried, nor in any sort seized.

2. That after indictment they cannot be seized and removed, or taken away before conviction or attainder; but then it may be said, to what purpose may they be searched and inventoried after indictment, if they may not be removed, but are equally liable to imbezzling as before.

I think he is not bound to find sureties, neither hath the officer at this day any power to remove them in default of sureties, and commit them to the vill, but only to inventory them and leave them where he found them, (unless in case of the second *Capias*, whereof before) for the prisoner or party indicted may sell them *bonâ fide*; and if he may do so, the vendee may take them, and the *Villata* cannot refuse the delivery of them to the vendee, tho the goods had been delivered to them.

But there is this advantage by the viewing and appraising, that thereby the king is ascertained what the goods are, and may pursue them, that take or embezzle them, by information, (if the party happen to be convicted) and try the property with them, whether they are really sold, or sold only fraudulently without valuable consideration to prevent the forfeiture, and so forfeited by the statute of 13 *Eliz. cap. 5.* notwithstanding such fraudulent sale.

IV. Lastly, touching execution of judgments of treason, they are directed by the judgment, whereof before.

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There be nevertheless some things, that accidentally happen, that suspend or abate the execution.

1. Reprieves *ex arbitrio regis vel judicis*, the king may by command or precept under his great or privy seal, privy signet, or sign manual, yea by signification under the hand of the secretary of state, or at this day by the subscription of a master of requests, command the reprieve of one condemned of treason or felony.

And altho the judge, by whom judgment is given, ought to be very cautious in granting a reprieve of one condemned for treason before him, yet he may upon due circumstances do it, as well in case of treason, as felony.

And this reprieve he may grant, and after he hath granted it may command execution after the sessions and adjournment of the commission. *Dy. 205.*

There are other reprieves, which are not arbitrary, but *quasi de jure*.

1. In respect of pregnancy, for tho pregnancy be no plea to delay judgment, yet it is a plea to delay execution, and therefore whenever any judgment in treason or felony is given against a woman, it is the duty of the judge, before he finish his sessions, to demand of her what she can allege why execution should not be made; yea in all cases, where a prisoner attaint is brought into another court, or reprieved to another sessions, he ought not to have any award of execution against him, till he be first demanded, what he can say, why it should not be, for possibly he may have a pardon after judgment. *22 Ass. 71.*

This plea of pregnancy *in retardationem executionis* hath these incidents to it: 1. She must be with child of a quick child. 2. If it be alleged, the judge, before whom it is alleged, must impanel an inquest of women *ex officio* to enquire of the truth of her allegation, *viz.* whether she be with child of a quick child, and if they find she is, then her execution is to be respited, if not, she is to be executed.

If it be found by the jury of women, that she is so with child, some have used to command a respite of her execution till a convenient time, for instance a month after her deli-

very, and then to be executed; but this seems irregular, for she may have a pardon to plead, and therefore it is to be respited till another sessions. 12 *Aff.* 10.

If she have once had the benefit of this reprieve and be deliverd, and afterwards be with child again with another quick child, she shall not have the benefit of a farther respite of the same judgment for that cause: *quod vide* 23 *Aff.* 2. *Coron.* 188. 22 *E.* 3. *ibidem* 253.

If the jury of women be mistaken in their verdict, and find her quick with child, where in truth she was not at all with child, (as once it happend at *Aylesbury*) if the next sessions of gaol-delivery, or *oyer* and *terminer* happen at that distance, that it is impossible by the course of nature, that she could be with child, but she must be deliverd mesne between the former sessions and this, as if it were ten months, &c. she shall be executed; but if the second sessions happen within such time after the first, that by course of nature she may still continue with child, as if it be within the distance of six months or the like, then she shall continue under the first reprieve till another session, *nam licet tempus ordinarium vitalis fœtus sit post 16. vel 18. septimanas post impregnatam, tamen in quibusdam citius contingere potest juxta medicorum placita.*

If in truth she were not with child with a quick child at the time, when the jury gave their verdict, but became quick after, nay tho she were not at all with child then, but became with child before the time of the second session with a quick child, in my opinion she shall have a second reprieve by reason of pregnancy, for the advantage that she had at first was not really because of pregnancy, but by a mistake of the jury of women, and therefore *in favorem prolis* she shall now have it.

And therefore, as hath been said, in all cases of reprieves for pregnancy the judge ought to make a new demand, what the prisoner hath to say, wherefore execution should not be awarded, for the first respite being by a kind of matter of record shall not be determined without a new award of exe-

cution; and altho clerks of assises enter those respites and awards only in a book of *Agenda*, yet regularly they are supposed to be entred of record, and these memorials are warrants for such entries, tho *de facto* it be not usually done.

Another cause of regular reprieve is, if mesne between the judgment and the award of execution the offender become *non compos mentis* (*i*), the judge in that case may both in case of treason and felony swear a jury to inquire *ex officio*, whether he be really so, or only feigned or counterfeit; and thereupon if it be found that he be really distracted, must award a reprieve *de jure* till another sessions, *Co. P. C. p. 4.* and the statute of 33 *H. 8. cap. 20.* that directed an execution of parties convict of treason notwithstanding insanity intervening after judgment is repeald, by 1 & 2 *P. & M. de quo supra p. 283.*

Now as to the abating of some parts of the execution in case of high treason, as drawing, hanging, evisceration and quartering, and leaving the offender only to be beheaded, this may be, and usually is by the king's warrant under his great seal, privy seal, yea or his privy signet, or sign manual, as usually is done in case of noblemen or great men falling under that judgment, for one part of the judgment, *viz.* decollation, and the substance of the whole judgment, *viz.* the death of the party, is performed.

(i) See Sir *John Hawles's* remarks on the trial of *Charles Bateman*, *State Tr. Vol. IV. p. 204.*

C H A P. XXVIII.

Touching the crime of misprision of treason, and felony, &c.

THO the order proposed in the beginning should refer misprision of treason to that series of offenses, that are not capital, yet because this offense hath relation to treason, and may be of use to explain the nature of it, I shall here take it into consideration, referring misprision in its large and comprehensive nature to its proper place.

Misprision of treason is of two kinds.

1. That which is properly such by the common law.

2. That which is made misprision of treason by act of parliament.

Misprision of treason by the common law is, when a person knows of a treason, tho no party or consenter to it, yet conceals it and doth not reveal it in convenient time.

Tho some question was antiently, whether bare concealment of high treason were treason, yet that is settled by the statute of 5 & 6 E. 6. cap. 11. and 1 & 2 P. & M. cap. 10. viz. that concealment or keeping secret of high treason shall be deemed and taken only misprision of treason, and the offender therein to suffer and forfeit, as in cases of misprision of treason, as hath heretofore been used: tho in the time of Henry VIII. and Edward VI. some things were made misprision of treason, that were not so formerly, yet by the statute of 1 Mar. cap. 1. it is enacted, that nothing be adjudged to be treason, petit treason, or misprision of treason, but what is contained in the statute of 25 E. 3. and altho that act of 25 E. 3. do not make or declare misprision of treason, yet it doth it in effect by declaring and enacting what is treason, which is the matter or subject of misprision of treason,
tho

tho the misprision or concealment thereof be a crime, which the common law defines what it is.

Therefore since the statute of 25 E. 3. is by the statute of 1 Mar. cap. 1. made the standard of treason, it remains to be inquired, what shall be said the concealment of such a treason according to the reason and rule of the common law.

If a man knew of a treason, by the old law in *Bracton's* time he was bound to reveal it to the king or some of his council within two days, *quod si ad tempus dissimulaverit & subticuerit, quasi consentiens & assentiens, erit seductor domini regis* (a); but at this day it is but misprision, if he reveals it not as soon as he can to some judge of assise, or it seems to some justice of peace, for tho the crimes of treason or misprision of treason be not within the commission of a justice of peace to hear and determine, yet, as it is a breach of the peace, the justices of peace may take information upon oath touching it, and take the examination of the offenders and imprison them, and bind over witnesses and transmit these examinations and informations to the next sessions of gaol-delivery or *oyer* and *terminer* to be further proceeded upon, as is truly observed by Mr. Dalton (b), cap. 90. nay, I have known chief justice *Rolls* affirm, that justices of the peace may take an indictment of treason, tho they cannot determine it, *viz.* as an information or accusation tending to the preservation of the peace.

But some treasons enacted by some statutes are limited to be heard and determined by them, as appears in some of the statutes before mentiond, p. 350.

It is said 3 H. 7. 10. *Stamf.* 38. a. Dalton, cap. 89. (c), the uttering of false money known to be false is misprision of treason; but it is a mistake; indeed it is a great misprision, but not misprision of treason, unless the utterer know him, that counterfeited it, and conceal it, this indeed is misprision of treason,

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(a) *Bract.* Lib. III. de corona, cap. 3. last book says it is misprision of treason.
 (b) *New Edit.* cap. 141. p. 460. but the other two only say it is a mis-
 (c) *New Edit.* cap. 140. p. 452. This sion.

treason, but not the uttering of it, for the money is not the traitor, but he that counterfeited it, and his counterfeiting is the treason.

As all treasons and declarations of treasons between 25 E. 3. and 1 Mar. are repeald by 1 Mar. cap. 1. so consequently all misprisions of any other treason not containd in 25 E. 3. are thereby repeald, Coke P. C. p. 24. hath these words, *Misprision of treason is taken for concealment of high treason or petit treason, and only of high treason or petit treason specified and expressed in the act of 25 E. 3. and in the margin, that is of such treason high or petit, as is expressed in the act of 25 E. 3. and of no other treason*; and accordingly uttering of counterfeit coin was agreed by the court (d) at Newgate, August 1661. to be neither treason nor misprision of treason within the statute of 25 E. 3. but only punishable with fine and imprisonment; *ex libro domini Bridgman manu sua scripto.*

If a subsequent act of parliament after 1 Mar. make a new treason, the concealment of such a treason is certainly misprision of treason for these reasons, 1. Because misprision of treason is not any substantive crime of itself, but relative to that, which is, or is made treason, and a kind of necessary consequent and result from it, as the shadow follows the substance. 2. And hence it is, that tho the statute of 25 E. 3. does not by express words enact misprision of treason to be an offense, yet treasons being settled by that act, the statute of 1 Mar. cap. 1. enacts there shall be no misprision of treason but what is enacted by the statute of 25 E. 3. for tho that act speak not of misprision of treason, yet settling those things that are treason, it doth virtually and consequentially make the concealing of any of them misprision of treason; but yet farther, when the act of 1 & 2 P. & M. cap. 10. enacts divers new treasons, tho it enact nothing to make the concealment thereof misprision, yet in the proviso above-mentiond it takes notice, that concealment of any of these treasons would be at least misprision of treason, and therefore provides, that the concealment thereof shall not be adjudged

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treason,

(d) In the case of *Richard Oliver*, *Kel.* 33.

treason, but only misprision of treason, any thing above-mentioned to the contrary thereof notwithstanding; and the like clause is in the above-mentioned statute of 5 & 6 E. 6. cap. 11. Again, my lord Coke, *P. C. cap. 65. p. 139.* says, *As in case of high treason, whether the treason be by the common law or statute, the concealment of it is misprision of treason; so in case of felony, whether the felony be by the common law or by statute, the concealment of it is misprision of felony; so that certainly, if a felony or a treason be enacted by a new law, the concealment of the former falls under the crime of misprision of felony, and the latter under the crime of misprision of treason, as a consequent of it without any special words enacting it to be so.*

All treason is misprision of treason and more, and therefore, he that is assisting to a treason, may be indicted of misprision of treason, if the king please. *Stamf. P. C. 37. b. Co. P. C. 36. 2 R. 3. 10. b.*

Altho the statute of 1 & 2 P. & M. cap. 10. hath as to treasons repealed the statute of 33 H. 8. cap. 23. for trying treasons in one county committed in another, yet it hath not repealed the same statute as to the trial of murder and misprision of treason, which may yet be tried according to the statute of 33 H. 8. cap. 23.

In case of misprision of treason and misprision of felony, as well as in case of treason or felony, or accessory thereunto, a peer of this kingdom shall be tried by peers, but the indictment is to be by a common grand inquest. *2 Co. Inst. 49.*

The judgment in case of misprision of treason is loss of the profits of his lands during his life, forfeiture of goods, and imprisonment during life.

By what hath been said touching misprision of treason we may easily collect what is the crime of misprision of felony, namely, that it is the concealing of a felony which a man knows, but never consented to, for if he consented, he is either principal or accessory in the felony, and consequently guilty of misprision of felony and more.

The judgment in case of misprision of felony in case the concealer be an officer, as sheriff or bailiff, &c. is by the sta-

tute of *Westminst.* 1. *cap.* 9. (e) imprisonment for a year and ransom at the king's pleasure; if by a common person, it is only fine and imprisonment.

And note once for all, that all those acts of parliament, that speak of fines or ransoms at the king's pleasure, are always interpreted of the king's justices: *vide Co. Magna Carta super stat. Westminst.* 1. *cap.* 4. *in fine* (f) & *sepius alibi.* 2 R. 3. 11. a. *voluntas regis in curiâ, not in camerâ.*

And it seems, that misprison of petit treason is not subject to the judgment of misprison of high treason, but only is punishable by fine and imprisonment, as in case of misprison of felony.

II. I come to misprisings of treason so enacted by acts of parliament since 1 *Mar.* *cap.* 1. for, as before is observed, by that act all misprisings, that by any statute made after 25 E. 3. are either expressly or consequentially made misprisings of treason, are repealed and set aside.

All acts of parliament, that after 1 *Mar.* enacted any thing to be high treason, do consequentially make the concealment thereof to be misprison of treason, tho it do not in express words enact the concealment thereof to be misprison of treason, as hath been before shewn, and the like in case of felony.

And consequently those acts of parliament, which enacted temporary treasons, as the statute of 1 & 2 P. & M. *cap.* 10. the act of 1 *Eliz.* *cap.* 5. &c. so far forth as they are temporary; the misprisings of such treasons are also temporary, and expire with the act, and where the acts of treason are perpetual, or being but temporary are made perpetual by some other act of parliament, the misprison of such treasons remains such, as long as the act of parliament making such treason continues, or is continued, as upon the statutes of 5 *Eliz.* and 18 *Eliz.* 1 *Mar.* touching counterfeiting of foreign coin made current by proclamation, or clipping or washing coin.

And the like is to be said in all respects of misprison of felony made so by act of parliament.

But

(e) 2 *Co. Inst.* 172.

(f) 2 *Co. Inst.* 168.

But besides these crimes, that are consequentially misprision of treason, some offenses are made misprision of treason, as a kind of substantive offense, and not consequential upon the making of treason, but particularly enacted.

Those of that kind, that are perpetual and have continuance, are as follow :

14 *Eliz. cap. 3.* “ They that counterfeit forein coin of gold
“ or silver not permitted to be current in this kingdom, their
“ procurers, aiders, and abettors shall suffer, as in case of
“ misprision of treason.

And note, that in that act (*aiders*) are intended of aiders in the fact, not aiders of their persons, as receivers and comforters, for, as hath been observed *p. 236.* in some acts of parliament *aiders* being joined with procurers, counsellors and abettors are intended of those, that are aiding to the fact; but in other acts of parliament, where the word *aiders* is joined with maintainers and comforters, it is intended of those, that are aiders *ex post facto* to their persons; see this difference in the penning of several acts of parliament, for the first part 5 *Eliz. cap. 11.* 18 *Eliz. cap. 1.* 1 *Mar. sess. 2. cap. 6.* touching coin, and for the second part this express distinction observed 13 *Eliz. cap. 2.* touching publishing of bulls of absolution, where the former kind are enacted to be traitors; the second incur a *præmunire*; the like 23 *Eliz. cap. 1.*

13 *Eliz. cap. 2.* “ If any bull or absolution, or instrument
“ of reconciliation to the see of *Rome* be offered to any per-
“ son, or if any person be moved or perswaded to be recon-
“ ciled, if he conceal the said offer, motion or perswasion,
“ and doth not discover or signify it by writing or otherwise
“ within six weeks to some of the privy council, &c. he shall
“ incur the penalty and forfeiture of misprision of treason,
“ and that no person shall be impeached for misprision of
“ treason or any offense made treason by this act, other than
“ such as are before declared to be in case of misprision of
“ treason:” *nota*, had it not been for this cause the concealment generally of any treason within this act had been misprision of treason.

23 *Eliz. cap. 1.* “ All persons, that shall put in practice to
“ absolve or withdraw the subjects of the queen from their
“ obedience, or to that end perswade them from the reli-
“ gion here established, or if any person shall be so absolved,
“ every such person, and their counsellors and procurers
“ thereunto, shall be adjudged guilty of high treason.

“ And all persons, that shall wittingly be aiders and main-
“ tainers of such person so offending, or any of them, know-
“ ing the same, or which shall conceal any offense aforesaid,
“ and not reveal it within twenty days after his knowledge
“ thereof to some justice of peace, or other higher officer,
“ he shall suffer and forfeit, as in misprision of treason.

C H A P. XXIX.

Concerning petit treason.

AS at common law there was great uncertainty in high treason, so there was in petit treason.

It is true, that all the petit treasons declared in this statute (*a*) were petit treasons at common law, as for a servant to kill his master or mistress, 12 *Aff.* 30. a woman to kill her husband, as appears 15 *E. 2. Corone* 383. and the judgment was the same at common law in such cases, as now, and the lands of him, that was attaint of petit treason, escheted to the mesne lord, of whom they were held, 22 *Aff.* 49. so that as to these things the act of 25 *E. 3.* was but an affirmance of the common law.

But yet there were certain offenses, that were petit treason at common law, that are restrained and abrogated by this statute from being petit treason.

15 E. 2. *Corone* 383. A woman intending to kill her husband beat him so, that she left him for dead, but yet he recovered, for this attempt the wife had judgment to be burned.

Fleta, Lib. 1. cap. 22. Britton, cap. 8. If the homager or servant falsify the seal of his lord, or had committed adultery with the lord's wife or daughter (*b*), it was petit treason.

But these are taken away by this act of 25 E. 3. and are reduced only to these three ranks :

1. The servant killing his master or mistress. 2. The wife killing her husband. 3. The clergyman killing his prelate or superior, to whom he owes faith and obedience.

All petit treason comes under the name of felony, and a pardon of all felonies, where petit treason is not excepted, at common law pardoned petit treason, and so at this day doth a pardon of murder.

A man or woman, that commits petit treason, may be indicted of murder, but if all felonies, &c. are pardoned by act of parliament, wherein there is an exception of murder, it seems that a murder, which is a petit treason also, is discharged and not within the exception, *M. 6 & 7 Eliz. Dyer* 235. (*c*)

The killing of a master or husband is not petit treason, unless it be such a killing, as in case of another person would be murder, and therefore upon an indictment of petit treason for a servant killing his master, if upon the circumstances of the case it appear to be a sudden falling out, and the servant upon a sudden provocation kill his master, which, in case it had been between other persons, had been only manslaughter, the jury may acquit him of petit treason, and find him guilty of manslaughter; and thus it was once done before me at *Dorchester* assises, and another time before justice *Windham* at *Coventry* assises, tho the indictment were for petit treason.

If a wife conspire to kill her husband, or a servant to kill his master, and this is done by a stranger in pursuance of that

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(*b*) *Britton* adds, or the nurses of his children.

(*c*) The reason of this is, because petit treason is an offense of another species, 6 *Co. Rep.* 13. *b.* but then by the

same reason a pardon of murder does not include a pardon of petit treason, nor can one guilty of petit treason be indicted of murder. See *Rex versus Crispe, State Tr. Vol. VI. p. 224, 225.*

that conspiracy, it is not petit treason in the servant or wife, because the principal is only murder, and the being only accessary, where the principal is but murder, cannot be petit treason; but if the wife and a servant conspire the death of the husband, being his master, and the servant effect it in the absence of the wife, it is petit treason in the servant, and she is accessary before to the petit treason, and shall accordingly be indicted and burnt. *P. 16 Eliz. Dy. 332. a. 40 Aff. 25.*

If the servant and a stranger, or the wife and a stranger conspire to rob the husband or master, and the servant or wife be present and hold the candle, [while the husband or master is kild*,] the stranger is guilty of murder, and the wife or servant guilty of petit treason as principal, because present. *2 & 3 P. & M. Dy. 128. a.*

So that the statute of 25 E. 3. doth not only extend to the party, that actually commits the offense, but also to those that were procurers, aiders or abettors, *scilicet*, if they be present, they are guilty of petit treason as principals, if absent, yet if the offense in the principal be petit treason, the offense in the accessary before is petit treason, as accessary, as in *Brown's case, Dy. 332. a.*

If a wife or a servant intending to poison or kill a stranger, and missing the blow the wife by mistake kills or poisons her husband, or the servant his master, this, that would have been murder, if it had taken effect against the stranger, becomes petit treason in the death of the husband or master. *Plowd. Com. 475. b. Crompt. de pace regis 20. b. and Dalt. cap. 91. (d);* so if he shoot at *J. S.* and missing him kills his master. *Ibid.*

If the wife or servant conspire with a stranger to kill the husband or master, if the wife or servant be in the same house, where the fact is done, tho not in the same room, it is petit treason in them, and they are principals in law, because in law adjudged to be present, when in the same house; but if they had been absent, then they had been only accessaries

* These words are not in the *MS.* and the sense plainly requires them, but they are in the case cited from *Dyer,* (*d.*) *New Edit. cap. 142. p. 462.*

ries before the fact to murder. *Crompt. de pace regis* 21. *a.* *Bleebenden's* case.

If the wife or servant command one to beat the husband or master, and he beat him, whereof he dies, if the wife or servant be in the same house, it is petit treason in the wife or servant as principals, but murder in the stranger. *Crompt. 20. b.* *Plowd. Com. 475. b.*

For whatsoever will make a man guilty of murder will make a woman guilty of petit treason, if committed upon the husband, or the servant, if committed upon the master.

Eadem lex mutatis mutandis for an inferior clergyman in relation to his superior.

But now to descend to particulars.

I. A servant killing his master.

Who shall be said *a servant* or *a master*.

If the servant kill his mistress or his master's wife, this is petit treason within this act. 19 *H. 6.* 47. *Plo. Com. 86. b. Co. P. C. 20. 12 Aff. 30.*

If a servant, being gone from his master, kills him upon a grudge, that he conceived against his master, while he was in his service, which he attempted while his servant, but was disappointed, it is petit treason. 33 *Aff. 7. Plowd. Com. 260. a. Co. P. C. 20.*

If a child live with his father as a servant, as if he receive wages from him, or meat and drink for his service, or be bound apprentice to him, and kills his father or mother, this is petit treason at this day. (*f*)

But if he receive no wages, nor meat and drink for his service, or be not bound apprentice to him, but only is his son and not his servant, and kills his father, this was petit treason at common law. 21 *E. 3.* 17. *b. per Thorp (g)*; but the better opinion is, that it is not petit treason at this day, because this statute of 25 *E. 3.* shall not in this case be extended by equity: *quod vide Co. P. C. 20. Lambart Justic. 248. Crompt. 19. b.*

II. The

(*f*) 1 *Mar. Dalison* 14.

(*g*) The book says, he was indicted for killing his *mere* (his mother) but *Coke P. C. p. 20.* says it is misprinted, and that it should be read *maistre*, (*his*

master) for *mēe*, being abbreviated, (as perhaps it was in the *MS.* of the year-books) may be read either way, tho' the last seems the most probable.

II. The wife killing her husband.

If the husband kill the wife it is murder, not petit treason, because there is subjection due from the wife to the husband, but not *e converso*.

If the wife be divorced from the husband *causâ adulterii vel sevitie*, she is yet a wife within this law, because this dissolves not the *vinculum matrimonii* by our law, for they may cohabit again, but otherwise it is, if they be divorced *causâ consanguinitatis* or *precontractûs*, for then the *vinculum* is dissolved, they are no more husband and wife.

If *A.* be married to *B.* and during that intermarriage *A.* marries *C.* tho *C.* be as to some purposes a wife *de factò*, yet she is not a wife within this law, for the second marriage was merely void, tho perchance she may upon circumstances be a servant within the former clause, if she cohabit with *A.* and he find her necessaries for her subsistence; *tamen quere.*

III. The clergyman killing his prelate, &c.

If a clergyman living and beneficed in the diocese of *A.* kill the bishop of that diocese, it is petit treason; but if he kill the bishop of the diocese of *B.* it is only murder.

If a clergyman hath a benefice in the diocese of *A.* and after by dispensation take a benefice in the diocese of *B.* if he kill the bishop of one diocese or the other, it is petit treason, for he owes and swears upon his institution canonical obedience to the bishop of each diocese.

If a clergyman beneficed in the diocese of *A.* within the province of *C.* kills his metropolitan, it seems it is petit treason, tho he be not his immediate superior.

If a clergyman be ordained by the bishop of *A.* *in ordinem diaconi, sive presbyteri sine titulo*, yet it seems if he kills the bishop it is petit treason, for he professeth canonical obedience upon his ordination.

Concerning proceedings in petit treason.

In high treason all are principals, but in petit treason there are principals and accessaries, as well before, as after.

If the principal be only murder, as being committed by a stranger, the accessary cannot be petit treason, tho she be a wife or servant. *Dy. 332. Brown's case ubi supra.*

But if the principal be petit treason, as being committed by a wife upon her husband, or by a servant upon his master or mistress, if the accessory be of the same relation, *viz.* a servant or wife, the judgment shall be given against the accessory, as in petit treason; but if the accessory, whether before or after, be a stranger, tho such stranger be an accessory to petit treason, yet the judgment shall be as in a case of felony against the accessory, *viz. quod suspendatur*, for tho he be an accessory to petit treason, which is the principal, yet such accessory being a stranger is not nor can be guilty of petit treason, because a stranger to the party kild, and neither wife nor servant.

At common law, and by the statute of 25 E. 3. *cap.* 4. clergy was allowable in case of petit treason, but not in case of high treason; but now by the statute of 23 H. 8. *cap.* 1. 1 E. 6. *cap.* 12. clergy is excluded from petit treason, as well as murder, and in the same kind.

If a person arraigned of high treason stand wilfully mute, he shall be convicted as hath been formerly shewn; but if arraigned of petit treason, he stand mute, he shall have judgment of *peine fort & dure*. *Crompt.* 19. *b.* *Co. P. C.* 217.

The judgment of a woman convict of petit treason is to be burnt (*b*), but (by *Stamf. P. C. fol.* 182. *b.*) in high treason to be drawn and burnt, unless it be in case of coin, and then only to be burnt, as in case of petit treason.

But the judgment against a man convict of petit treason is to be drawn and hanged, *trahatur & suspendatur per collum*.

Stamford in *P. C.* 182. tells us, that the execution of drawing is to be upon a hurdle, but 33 *Aff.* 7. *Shard* justice commanded, that nothing should be brought, whereupon he should be drawn, *mes que sans cley ou autre chose a desouth lui soit tray de chevaux hors de la sale, ou il avoit judgement, tanque a les furc, &c.* but that severity is disused; he is in such cases drawn upon a hurdle to the place of execution.

And thus far touching petit treason.

(*b*) The judgment of a woman convict of petit treason (or in case of coin) is all one as in high treason, *viz. to be drawn and burnt. Co. P. C. p.* 211. and so is the constant practice.

C H A P. XXX.

Concerning heresy and apostacy, and the punishment thereof.

Under the general name of *heresy* there hath been in ordinary speech comprehended three sorts of crimes :
1. *Apostacy*, when a christian did apostatize to *Paganism* or to *Judaism*, and the punishment hereof, as well by the law of this kingdom, as by the imperial laws, seems to have been by death, namely burning. *Bract. Lib. III. de coronâ, cap. 9. (a).* by the imperial law he was subject to loss of goods, *Cod. de apostatis, tit. 7. lege 1.* but it appears not, whether he were to suffer death, *Ibid. l. 6.* unless he solicited others to apostacy (*b*).
2. *Witchcraft, Sortilegium* was by the antient laws of *England* of ecclesiastical cognizance, and upon conviction thereof without abjuration, or relapse after abjuration, was punishable with death by writ *de heretico comburendo*, vide *Co. P. C. cap. 6. & libros ibi, Extr' de hereticis, cap. 8. §. 5. n. 6.* 3. *Formal heresy* ; the old popish canonists define an heretic to be such, *qui male sentit vel docet de fide, de corpore Christi, de baptisate, peccatorum confessione, matrimonio, vel aliis sacramentis ecclesiæ, & generaliter, qui de aliquo prædictorum vel de articulis fidei aliter prædicat, sentit vel doceat, quam docet sancta mater ecclesiæ* ; and whereas the antient councils and imperial constitutions grounded thereupon kept the business of heresy within certain bounds and descriptions, as the *Manichees, Nestorians, Eutychians, &c.* quod vide in *Codice, Lib. I. tit. 5. de hereticis, l. 5.* in the edict of *Theodosius* and *Valentinian* ; the papal canonists have by ample and general terms extended heresy so far, and left so much in the discretion of the ordinary to determine it, that there is scarce any the smallest deviation from them, but it may be reduced to heresy according to the great generality,

(a) p. 123. b.

(b) Then it was capital, *Lib. I. Cod. tit. 7. l. 5.*

rality, latitude, and extent of their definitions and descriptions, whereof see the gloss of *Lindwood* in *titulo de Hæreticis, cap. 1. Reverendissimæ ad verbum declarentur*: the definition of *Grostead*, tho somewhat general, is much more reasonable as we have it given by Mr. *Fox*, *Acts & Mon. part. 1. p. 420. Est sententia humano sensu electa, palàm docta, pertinaciter defensa*; but of this more hereafter.

In this business of heresy, and the punishment thereof, I shall, as near as I can, use this method: 1. I will consider in general who is the judge of heresy according to the common and imperial law. 2. Who shall be said an heretic according to those laws. 3. What the punishment of an heretic is according to those laws: then I shall consider more specially, *viz.* 1. What was the method of the conviction of heresy according to the antient law used in *England* before the times of *Richard II.* and *Henry IV.* And 2. What was the usual punishment of heresy here in *England* before the time of *Richard II.* and *Henry IV.* 3. I shall give an account touching the proceeding against heretics from the beginning of *Richard II.* to the twenty-fifth year of king *Henry VIII.* 4. What is the method of proceeding, and how the law touching heresy, heretics, and their punishment from 25 *H. 8.* until the first year of queen *Elizabeth.* 5. How the law stood from 1 *Eliz.* to this day touching this matter.

I. According to the common and imperial law, and generally by other laws in kingdoms and states, where the canon law obtained, the ecclesiastical judge was the judge of heresies, and hereby they obtained a large jurisdiction touching it, so that there was scarce any thing, wherein a man dissented from the doctrine or practice of the *Roman* church, but they took the liberty to determine heretical, *qui à recto tramite, & iudicio ecclesiæ catholicæ detectus fuerit deviare, & is qui dubitat de fide catholicâ, yea even, qui despicit & negligit servare ea, quæ Romana ecclesiæ statuit vel servare decreverat: vide Lindwood de hæreticis in cap. Reverendissimæ ad verbum declarentur*, which left an excessive arbitrary latitude in the ecclesiastical judge, and a great servitude and uncertainty upon men subject to their censures: the ecclesiastical judge was ei-

ther extraordinary, viz. certain inquisitors thereunto deputed by the pope, or ordinary, which was the bishop of the diocese, as appears by *Lindwood de hereticis, cap. finaliter verb. ordinarius in glossa*; (*) only for the more solemnity of the business of degradation, which accompanied the sentence of heresy upon one in orders, before the offender was left to the secular power, there were six, but afterwards three bishops to be present in degradation à *sacris ordinibus, viz. the episcopal, Presbyteratus, Diaconatus & subdiaconatus*, but in *minoribus ordinibus* there was only required the bishop and his chapter, *canonici sive clerici, 6 decretal, cap. 2.* afterward the business of degradation was reduced to one bishop, viz. the ordinary of the place, so far at least as the same respected the *ordo Presbyteratus* and inferior orders.

But I do not find, that by the canon or civil law the declaratory sentence of heresy was necessary in a provincial synod, tho in great cases, especially where a priest was to be degraded, it was most commonly done in a provincial synod; partly for the greater solemnity of the business, and partly because in such synods more bishops and others of the clergy were present; but how the use was in *England* we shall hereafter see.

II. As to the second, touching heretics and their discriminations according to the canon law, they may be distinguished into three ranks: 1. *Simplex hereticus.* 2. *Hereticus contumax.* 3. *Hereticus relapsus.*

1. A simple heretic was such, as held an heretical opinion, but being convened before the ordinary, and the opinion being substantially declared heretical, and the party convicted thereof, declares his penitence and abjures his opinion, in this case he was dismissed without farther punishment, and this abjuration might be required by the ordinary, and was of two kinds, viz. a special abjuration, whereby he abjured that single heretical opinion, for which he was condemned, or a general abjuration, whereby he renounced all heretical opinions: vide *Lindwood de Hereticis, cap. Reverendissimæ verb. nisi resipiscant & abjurerint in formâ ecclesiæ consueta*: and

(*) See also *Lindwood de hereticis cap. item quia verb. ordinarii.*

this abjuration might be required not only of those, that were detected and convicted of heresy, but even of those, that were *graviter suspecti*; and if they refused it, they proceeded to sentence them as convict: *Extr' de Hereticis, cap. ad abolendam.*

2. A contumacious heretic was among them of two kinds: 1. Such as refused to appear before the ordinary, being accused of heresy, and thereupon were duly excommunicate, and so continued excommunicate for one year, *tum velut hereticus condemnetur*, and was thereupon deliverd or left to the secular power, *de hereticis, cap. 7. cum contumaciâ in 6to. &c.* 2. Where the party accused of heresy was convict by testimony or his own confession, and refused to repent and abjure, such a one might thereupon be sentenced as an heretic, and deliverd over to the secular power, but yet he had this favour or privilege, if even after such sentence he willingly repented and abjured, the ordinary ought to accept thereof, and not deliver him over to the secular power, but he was spared. *Lindwood de Hereticis, cap. Reverendissimæ verb. relapsant, & Extr' de Hereticis, cap. ad abolend. verb. sponte recurrere*; but then the ordinary might detain him in prison: *vide accordant 1 Mar. Br. Heresy.*

3. A relapsed heretic: and herein they distinguish between *fictè relapsus*, & *verè relapsus*: *Lindwood de Hereticis cap. item quia, verb. relapso*: 1. The former is where a man is accused of heresy, and is under a great suspicion thereof, but not convicted, only the ordinary puts him to abjure, which accordingly he doth, and afterwards doth entertain, visit, or comfort heretics, such a person by the canon law may be sentenced as an heretic relapsed, and deliverd over to the secular power, but yet the ordinary may, as before, detain him in prison without actual delivering of him over to the secular judge to be executed. *Lindwood ubi supra, & in 6to decretal. cap. 8. Accusat' de hereticis.* 2. *Verè relapsus* is, when a man being convicted of heresy, and abjuring again falls into heresy, if he be thereupon convicted and sentenced, there can be no suspension of the sentence by the ordinary, tho the party repent and conform, but he must be deliverd over

to the secular power, and the sentence ought to be given, and is not by any means to be suspended from execution: *6to de Hereticis, cap. 4.*

But this relapsing is of two kinds according to the quality of his abjuration: if the abjuration be general of all heresies, if he after fall into any heresy, either that, whereof he was formerly accused and convicted, or any other, he is to be sentenced as a relapsed heretic; but if the abjuration be only special of that heresy, whereof he is accused, then he is not to be sentenced, as a relapsed heretic, unless he after fall again into the same heresy, which he so specially abjured; but herein there is some difference among the doctors, for some think even after a special abjuration of one particular heresy, if he fall into another heresy, *censetur relapsus: vide Extr. de Hereticis, cap. Accusat. §. 2. Eum vero in 6to & Lindwood de hereticis, cap.* Item quia *verbo simpliciter in glossa:* but the ordinary may put this out of question, for it seems by the canon law he may at his pleasure in cases of heresy require a general abjuration, *viz. de heresi generaliter & simpliciter.*

III. Now as to the punishment itself of heresy, especially of those, that are either *contumaces*, or *relapsi*: 1. By the civil law; it is true, that the conviction and sentencing of heretics is as well thereby, as by the canon law, left to the ecclesiastical judge, so that without a declaration or sentence of the ecclesiastical judge the civil jurisdiction cannot proceed to inflict any punishment. *Lindwood de hereticis, cap. Reverendissimæ verb. confiscata in glossâ,* tho confiscation of goods of the heretic followed upon his conviction, *necessaria tamen est sententia declarativa judicis super ipsâ confiscatione, & hæc sententia fieri solummodo debet per judicem ecclesiasticum, & non per judicem secularem: vide in 6to de hereticis, cap. secundum leges.*

But tho the decision and judicial sentence of heresy was belonging only to the ecclesiastical judge, yet the civil constitutions of emperors and princes did institute and enact several penalties, as consequential upon such sentence, such as were confiscation of goods, disherison of heirs, and in some cases death, as we shall see hereafter: *quod vide in Codice, Lib. I. tit. 5. de hereticis per totum.*

As to the penalty of death, *ultimum supplicium*: it should seem the antient imperial constitutions made a difference between heretics in relation to that punishment: it appears by the edict of *Theodosius, Codice, cap. 4.* the *Manichees* and *Donatists* were punished with death, and possibly so were the *Nestorians, ibidem cap. 6.* and generally all heretics, that seduced the orthodox to rebaptization, *ibid. cap. 23.* many other heretics were under milder sentences, some were punished with exile, some with extermination from the city, some with pecuniary mulcts, and some with confiscation, which, it seems, was the most usual punishment: but it seems, that by the constitution of the emperor *Frederic*, (which yet is not extant) *Hodie indistincte illi, qui per judicem ecclesiasticum sunt damnati de heresi, quales sunt pertinaces & relapsi, qui non petunt misericordiam ante sententiam, sunt damnandi ad mortem per seculares potestates, & per eas debent comburi seu igne cremari. Lindwood de hereticis, cap. Reverendissimæ verb. pœnas;* and from this constitution of *Frederic* the course of burning generally all heretics indistinctly, if pertinacious or relapsed, took its rise.

Now as to the penalties by the canon law, it is true they go no farther than ecclesiastical censures, injunction of penance, excommunication, and deprivation of ecclesiastical benefices; but yet they made bold by some of their constitutions to proceed farther, and indeed farther than they had authority; such were among others imprisonment by the ordinary, and confiscation of goods (c), but whether they adventured hereupon only in subservience to civil constitutions, or whether by their own pretended power, may be doubtful; but howsoever, it is so decreed in their canons and constitutions: *vide Lindwood de hereticis cap. Reverendissimæ verb. confiscata, & ibidem Item quia verb. sententialiter.*

But indeed as to the inflicting of death upon heretics, their canons go not so far as that; neither indeed need they, for emperors and princes being induced by them to enact such severe constitutions, they did in effect the business by sentencing the

(c) For in *England* before the statute were forfeited by a conviction for heresy. *2 H. 5. cap. 7.* neither lands nor goods *fy. 3 Co. Instit. 43.*

the heretic, and then leaving him to the secular power, so that the secular power was only in nature of their executioner; and altho they direct in some cases of treason an intercession to be made to the secular power to spare the life of the offender thus committed over to the secular power, *Extr. de verborum significatione cap.* Novimus, yet we find no such courtesy for heretics, but the princes, that do not effectually proceed according to the utmost of their power to eradicate them, are threatned with excommunication, and accordingly they are required to take an oath to perform it, *Extr. de hereticis cap. Ad abolendam.* (*)

Therefore as to the punishment of heretics with death, of an heretic so declared by the bishop, it was left to the secular power with this difference, if the person convicted were a layman, he was immediately after his sentence to be deliverd to the secular power to be burnt; but if he were a clergyman within the greater or lesser orders, he was first solemnly degraded, beginning with the chiefest order he had, as that of priesthood, and so to the lowest, *damnati per ecclesiam judici seculari relinquuntur animadversione debita puniendi, clericis a suis ordinibus primò degradatis, Extr. de hereticis, cap. Excommunicamus;* (†) the solemnity whereof see at large in *6to decretal. de pœnis cap. Degradatio, Fox's acts and monuments part 1. p. 674.* the degradation of *William Sawtre.*

This degradation by the latter canons might be by one bishop, tho formerly it required more.

When the sentence was given by the ordinary, and the offender thus left to the secular power, he was deliverd over to the lay-officer, and then a mandate or writ issued from the chief magistrate to execute the offender according to the secular law; but of this more particularly hereafter.

I have been the longer in these particulars, that we thereby may observe these two things: 1. How miserable the servitude of christians was under the papal hierarchy, who used so arbitrary and unlimited a power to determine what they pleased to be heresy, and then *omni appellatione postposita* sub-

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jecting

(*) *Vide Constit. Frederici, §. 6.*

(†) *Vide Lindwood de hereticis, cap. In illi-*

ter verb. sententiet.

jecting mens lives to their sentence. (*) 2. How finely they made the secular power their vassals in execution of this odious piece of drudgery, as it was managed and practised by them.

I come now to a closer consideration of heresy, and its punishment according to the usage received in *England*, and the laws relating thereunto, according to the method above propounded.

I. Therefore how the usage and law obtained concerning this matter in *England* before the time of *Richard II.*

As the romish religion was generally received here in *England* in this period, so the manner of proceeding touching heresy was much according to the papal decretals and constitutions, whereof a large account is above given.

The jurisdiction, wherein heresy was proceeded against, was at the common law of two kinds: 1. The convocation or a provincial synod. 2. The diocesan or bishop of the diocese, where the heresy was published, and the heretic resided.

1. As to the former it is without question, that in a convocation of the clergy or provincial synod they might and frequently did here in *England* proceed to the sentencing of heretics, and when convicted, left them to the secular power, whereupon the writ of *Heretico comburendo* might issue, (thus it was done in the case of the apostate *Jew*, *Bract. de Coronâ, Lib. III. (d)*, and in the case of *Saxtre (e)*, 2 *H. 4.* who was convicted in the convocation of *London*,) and then the archbishop, who was *præses concilii*, pronounced the sentence, degraded the offender, if in orders, and signified the conviction into chancery, whereupon the writ *de heretico comburendo* issued.

2. As to the power of the bishop or diocesan alone there hath been diversity of opinions; some have thought, that the bishop of the diocese might proceed against heresy by ecclesiastical

(*) *Godfridus Colonienfis anno 1234.* speaking of the severity of the pope and the emperor *Frederic*, (the author of the constitution afore-mentioned for burning heretics) says, *Eodem die, quo quis accusatus est seu justè, seu injustè, nullius appellacionis, nullius defensionis* *refugio proficiente, damnatur, & flammis crudeliter injicitur.* See also *Mat. Paris, p. 429.*

(d) *Lib. III. cap. 9. fol. 124. a.*

(e) *State Tr. Vol. VI. Append. p. 2.*
Fox's Acts and Mon. Vol. I. p. 586. Rymer's Fed. Vol. VIII. p. 178.

astical censures, but as to the loss of life the conviction ought to be at least in a provincial council, without which the heretic ought not to undergo death by the writ *de heretico comburendo*, 1. For that in the case mentioned by *Bracton*, *Lib. III. de Coronâ* the conviction of that heresy, or rather apostacy, whereupon the offender was burnt, was in the provincial council at *Oxford*. 2. The writ *de heretico comburendo* in the register, and *F. N. B.* recites the conviction to be in a provincial council, and according to it is the opinion of *Fitzherbert*, *ibidem fol. 269.* and the statute of 2 *H. 4.* (hereafter mentioned) giving power to the ordinary finally to sentence an heretic, so that death should ensue thereupon, was *novæ jurisdictionis in hac parte introductæ*. Again, my lord *Coke*, 12 *Rep. p. 56, 57.* recites this to be the opinion of all the judges in 2 *Mar.* and in effect agreed unto 43 *Eliz.* by Sir *John Popham*, and others, 5 *Rep. Cawdrie's case, p. 23. a. accordant*, and *Brooke* seems to accord 1 *Mar. Br. Heresy*.

On the other side others have holden, that the diocesan alone by the canon law might convict of heresy, and that thereupon this writ may be issued: 1. This is consonant to the old decretals, and likewise to the provincial constitutions of *Arundel*, *Courtney* and others, that the diocesan alone without the assistance of a provincial council might convict of heresy, and deliver over the offender to the secular power. 2. Again, the statute of 2 *H. 4. cap. 15.* recites and admits the power of the diocesan in this case, but that by reason of the offenders going from diocese to diocese, and refusing to appear before the ordinary, he was interrupted in his proceeding, and thereupon the statute gives farther remedy. 3. That accordingly it was practised in the time of queen *Elizabeth*, when all former statutes concerning heresy were repealed, and the case stood as it was at common law. 4. That it was accordingly resolved by *Fleming*, *Tanfield*, *Williams* and *Croke* in 9 *Fac. (f)*, when *Legate* was burnt for heresy; and accordingly my lord *Coke P. C. cap. 5. p. 40.* seems to

to be of the same opinion (g), and so seems to retract what he had before deliverd in his 12th report.

This business will be farther considerd in the sequel of this chapter, for the present I shall only say thus much.

1. That the diocesan, as to ecclesiastical censures, may doubtless proceed to sentence heresy.

2. I think that at common law, and so at this day, (all former statutes being now repeald by 1 *Eliz. cap. 1.*) if the diocesan convict a man of heresy, and either upon his refusal to abjure, or upon a relapse decree him to be deliverd over to the secular power, and this be signified under the seal of the ordinary into the chancery, the king might thereupon by special warrant command a writ *de heretico comburendo* (h) to issue, tho this were a matter that lay in his discretion to grant, suspend, or refuse, as the case might be circumstantiated.

And what is here said of the diocesan or bishop of the diocese is true also of the guardian of the spiritualities *sede vacante*, but till the statute of 2 *H. 4.* the vicar general, commissary, or official of the diocesan had no cognizance, unless by special commission as an inquisitor from the pope; and *Limwood* gives the reason *de hereticis cap.* Item quia turpis verb. ordinarii in glossâ, *Est enim causa heresis una de majoribus causis, quæ pertinent ad solos episcopos*; but the statutes of 2 *H. 4. cap. 15.* 2 *H. 5. cap. 7.* while they were in force, gave the cognizance of heresy, as well to the bishop's commissary, as the bishop.

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3. But

(g) Lord *Coke* does not intimate as if he was of this opinion, or had retracted what he had said in his 12th report, (and had been solemnly resolved in *Cavedrie's* case); he says indeed, that from the statute of 2 *H. 4.* may be gathered this conclusion, that the diocesan hath jurisdiction of heresy, and accordingly it was resolved in *Legate's* case, and that upon a conviction before the ordinary of heresy, the writ *de heretico comburendo* doth lie; this he mentions as also resolved in *Legate's* case, as in truth it was; but to this last resolution he doth not declare any assent, for it is

the first only, which he says may be gathered from the act of 2 *H. 4.*

(h) Whether this writ lay at common law, or was introduced by the clergy about the time of *Henry IV.* hath been made matter of question: see *State Tr. Vol. II. p.* [275.] if the common law gave such a writ, it will be difficult to reconcile it with what our author says a little below, that the usual penalty was confiscation and banishment, and that 5 *R. 2.* was the first temporal law against heresy, which yet went not so high as death, but only to imprisonment and ecclesiastical censure.

3. But yet I never find before the time of *Richard II.* that any man was put to death upon a bare conviction of heresy, tho after a relapse, unless he were sentenced in a provincial council: and the reason seems to me to be this, when the offender was convicted of heresy either thro pertinacity, or after a relapse, and so deliver'd over to the secular power, the ecclesiastical judge had done his business, and the rest that follows was to be the act of the temporal or civil power, who were never obliged nor thought themselves obliged here in *England* to take away the life of a person upon so slender an account, as the judgment of a single bishop (*i*), nor indeed, unless it were a sentence by the weighty body of a provincial council: *vide Bracton, ubi supra.*

For as this kingdom was never obliged by the canons or decretals of popes or of provincial councils further, than they were admitted, so neither were they bound by the imperial constitutions of the emperor *Frederic* or others, who by their edicts inflict death upon all persons censured by the diocesan to be relapsed or contumacious heretics; but herein they did as the laws and usages of the kingdom, and their own prudence, and the circumstances of the case required or directed.

But yet I take it, that the conviction before the diocesan alone was a good conviction, and the party might thereupon be left to the secular power, and so burnt by a writ *de heretico comburendo*, if the king and his council thought fit, tho *de facto* it was not at all, or at least not usually so done, till the time of *Henry IV.* unless the conviction and sentence were in a provincial council, for the reason before given.

Fitzherbert therefore was herein mistaken, and also when he saith, it was to issue only in case of relapse; for a relapse could not be without conviction, and if the party were thereby convicted of the heresy, whereof he was accused, and persisted in it till after sentence, and refused to abjure, such a *contumax* or *pertinax hereticus* might be proceeded against as a relapsed heretic, and a writ *de heretico comburendo* might thereupon issue, as it seems, for the writ in the register being formed upon a relapsed heretic pursues the case as it finds

it, but is not exclusive of the other case of a contumacious heretic, that persists therein before and after the sentence; *de quo vide supra; vide accordant 1 Mar. Br. Heresy 1. and 25 H. 8. cap. 14.*

Touching the penalty of convicts of heresy here in *England*, I find very rarely death inflicted; before the reign of *Richard II.* the usual penalty was confiscation, and seizure of goods; *quod vide Claus. 20 H. 3. m. 11. dorf.* touching *Ernald de Peregard*, who was convict of heresy, and his goods seized to the king's use; the like, *Claus. 26 H. 3. m. 15. pro Stephano Peliter*, and as to corporal punishment of such convicts, it was usually in antient time banishment and stigmatizing, as appears by *Ralph de Diceto, sub anno 1166.* in the time of *Henry II.* and *Brompton H. 2. sub anno 1159. (*)*, but their conviction was in a provincial council held at *Oxon presente rege, & presentibus episcopis.*

But *quo jure* the forfeiture of goods was then practised, is considerable: *vide Co. P. C. cap. 5.* the forfeiture of goods was introduced by *2 H. 5.* and that statute being repealed, ceaseth.

And in the first temporal law or pretended law (*k*) made against such offenders, *viz. 5 R. 2. cap. 5.* where, upon certificate by the prelates into the chancery, commissions shall issue to the sheriffs to apprehend and imprison the offender, it is only until they will justify themselves according to the law and reason of holy church, so that it seems the punishment did not hitherto *de facto* exceed imprisonment and ecclesiastical censures; and yet it seems that *Swinderby* and others in the time of *Richard II.* before the statute of *2 H. 4.* were ordered to be executed for heresy: *vide Fox part 1. p. 580, 618.* but none by name appear to be executed, *ibidem p. 659.* but of this hereafter. (†)

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(*) See also *Mat. Paris, p. 105.*

(k) Our author here calls it a *pretended law*, and lord *Coke* calls it a *supposed act*, because the commons never consented to it, for which reason in the next session of parliament it was annulled, altho by the prelates means it hath been continually printed, and the act, which

annull the same, hath been from time to time kept from the print. *12 Co. Rep. p. 57.*

(†) It does not appear, that any were ordered to be executed for heresy in this reign, and as to *Swinderby*, Mr. *Fox* says, he was declared an heretic, but suffered no great harm during the life of king

As touching the writ *de heretico comburendo* it was no writ of course, nor issued by the chancellor, but by special warrant from the king upon the certificate of the conviction and sentence made to the king under the seal of the archbishop, if it were in a provincial council.

And thus far what I find concerning heresy at common law before the time of *Richard II.*

II. As to the times of *Richard II.* *Henry IV.* *Henry V.* and so to 25 *Henry VIII.*

The first temporal law or pretended law against heretics in this kingdom was 5 *R. 2. cap. 5.* which did not go so high as death, but only to imprisonment and ecclesiastical censure, as appears by the printed statute; but this was in truth no act of parliament, for the commons never assented; and accordingly *Rot. Parl. 6 R. 2. n. 52.* the same is declared by the king and parliament, which, it is true, was never printed among the statutes, but is at large recited by *Mr. Fox, part 1. p. 576.* and therefore we find no other punishment during this king's time, but imprisonment and ecclesiastical censures.

But in the time of *Henry IV.* the power of the diocesan was enlarged, *viz.* by the statute of 2 *H. 4. cap. 15. (1), viz.* the diocesan hath power given him to arrest and imprison persons suspect of heresy, till purgation or abjuration, and hath also power to fine and imprison persons for those offenses, and estreat the fines; and if a person be convict of heresy before the diocesan and his commissaries, and do refuse to abjure, or having abjured fall into relapse, so that according to the canons he ought to be left to the secular court, whereupon credence shall be given to the diocesan or his commissaries, then the sheriff of the same county shall be personally present at the preferring of the same sentence, when required by the diocesan, and shall receive the person sentenced, and cause him before the people in an high place to be burnt.

This

king *Richard II.* and if he was burnt, (1) This statute was afterwards repealed by 25 *H. 8. cap. 14.*
See *Fox's Acts and Mon. p. 620.*

This statute gave in effect the whole power to the diocesan, and upon this account *William Sawtre* (*m*) after sentence and degradation in the provincial synod of *London* was burnt in the beginning of *Henry IV.*'s usurpation; the whole process and history whereof is deliverd by *Mr. Fox* in his acts and monuments, *part 1. p. 674, 675.* and yet it is observable, this was not done barely by the order of the diocesan (*n*), but a special writ *de heretico comburendo* issued to the mayor and sheriffs of *London* to perform the same, which writ is there mentiond *verbatim*, and is the very same, which is recited by *F. N. B. fol. 269.* and was the warrant for the burning of *William Sawtre.*

Now touching this matter we are to observe, that the parliament of 2 *H. 4.* began the 20th day of *January in octabis Hilarii*, it continued till the 10th of *March* following, *William Sawtre*, having the year before been convicted for heresy before the bishop of *Norwich*, was upon the 22d and 24th of *Febr. 2 H. 4.* (which was sitting the parliament) in the provincial council held in *St. Paul's, London*, convicted and sentenced, as a relapsed heretic, and an heretic to be punished; this was done in the provincial council before *Thomas Arundel*, archbishop of *Canterbury*, as appears by the acts of the registry of *Canterbury* collected by *Mr. Fox*, *part 1. p. 673, 674, 675.* upon the 26th of *Febr.* the writ *de heretico comburendo* was formed and made by the advice of the lords temporal in parliament, which writ bears *teste 26 Febr. 2 H. 4. per ipsum regem & concilium in parlamento*, and is entred *verbatim* in the parliament-roll 2 *H. 4.*

I

n. 29.

(*m*) He was a parish-priest, first of *St. Margaret of Lynn* in the county of *Norfolk*, and afterwards of *St. Sythe's* church in *Sythe-lane, London*, and was the first, who appears to have been executed for formal heresy in *England.*

(*n*) Nor could it be so done, because he was not sentenced by virtue of the act of *H. 4.* which extended only to convictions before the diocesan or his commissary, whereas *Sawtre* was convicted before the convocation; and even on a conviction before the diocesan the sheriff had no power to burn the party con-

viect without a writ, unless he was present at the pronouncing the sentence, see *State Tr. Vol. VI. Append. p. 1.* besides, as our author observes below, this act did not pass till after *Sawtre* was sentenced, so that how it can be said, that it was upon account of this act that *Sawtre* was burnt, I know not, except it be with regard to the encouragement the clergy might take from the prospect of it's passing for anticipating the exercise of such a cruel (tho to them desirable) power.

n. 29. and is the very same with that in *Fitzh. N. B.* before mentiond, and agrees *verbatim* with it; and upon this writ *Sawtre* was burnt, being first solemnly degraded.

This conviction, sentence, and writ, tho after the commencement of the parliament, was before the end of that parliament, and consequently before the statute of 2 *H. 4. cap. 15.* passed, which passed not till the last day of the parliament, *viz. 10 Martii*; so that at that time the offender could not be executed but by writ *de heretico comburendo*, for the diocesan had not power by his own immediate warrant to command execution, till that passed, which passed not, till after the definitive sentence.

In this parliament there was a petition of the clergy against heretics, which was the foundation of the statute of 2 *H. 4. cap. 15.* and was granted by the king *de consensu magnatum & aliorum procerum regni in presenti parlamento existentium*, with some additional clauses, which were also drawn up into the act of 2 *H. 4. cap. 15.* but in that answer no consent of the commons appears, and yet the act was drawn up, and proclaimed, and, as it is now printed, is recited to be at the petition of the prelates, clergy and commons of the realm in parliament, and the enacting clause is by the king by the assent of the states and other discreet men of the realm being in the said parliament: this is observed by Mr. *Fox* in his *Acts and Monuments, part 1. p. 773.* whereupon he concludes, that this was no act of parliament, but an act of the king and clergy like that of 5 *R. 2.* before-mentiond, which was declared void, because the commons never assented, as is before observed.

But the truth is, the commons did assent to this act, tho their assent be not expressed in the parliament-roll as it is entered, as appears in the speech of the speaker of the commons to the king the last day of the parliament, *Rot. Parl. 2 H. 4. n. 47.* where they thank the king for the remedy he had ordained in destruction of the heretical doctrine of the sects; and besides in the same parliament-roll, n. 81. “ Inter petitiones communitatis, Item prient les communes, qe quant
“ ascun home ou feme, de quel estate ou condition qil soit,
5 I “ soit

“ soit prise & imprifone per *Lollardie*, qe maintenant soit
 “ mefn en respons, et eit tiel judgement, come il ad deservy
 “ en example dautres de tiel male feçt per ligierment cesser
 “ lour malveys predications, & lour tenir al a foy christian.
 “ Ro.’ le Roy le voet.

It is true this was never drawn up into a distinct act, for the provision by the statute of 2 *H. 4. cap. 15.* had a full and effectual provision for it; but this petition of the commons with the king’s assent was the principal basis, upon which the statute of 2 *H. 4. cap. 15.* was built, and the statute was drawn up upon both petitions, as well that of the commons, as that of the clergy both put together, as was usual in those times, and so warrants the recital of the preamble of the printed statute of 2 *H. 4.* of the petition both of the clergy and commons (*), and every man knows, that in the times of *Henry IV.* and afterwards the true professors of the christian religion, (that yet for the same were sentenced as heretics,) came under the reproachful title of *Lollards*.

This act of 2 *H. 4.* doth not determine what is heresy or what not, but leaves it to the decision of the diocesan, which wild and unbounded jurisdiction they had and used, till 25 *H. 8.* this therefore was their power at common law, and the temporal judge or power was to give credence herein to their sentence, but yet the consequence thereof being but to be left to the secular power, the secular power might exercise his own discretion, and grant a writ *de heretico comburendo*, if he were satisfied of the justice of the sentence, or forbear the granting it, if he were not satisfied, that the thing charged was a real heresy, or that the ecclesiastical judge had proceeded fairly in the case. (†)

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But

(*) This petition of the commons amounts to no more, than that the *Lollards* should be cald to an account and punished according to their deserts, but contains nothing in it, which can be a warrant for such severe penalties, as are provided by that act, these proceeded from the petition of the clergy.

(†) But by the papal constitutions this liberty is not allowed to the secular power, for by those constitutions it is provi-

ded, That the punishment of heretics must not be relaxed or delayed. *Constit. Innoc. IV. cap. 24. and 32. Clem. IV. Constit. XIII.* and “ That all magistrates
 “ under the penalty of excommunication
 “ must execute the penalties by the in-
 “ quisitors imposed on heretics without
 “ revising the justice of them, for heresy
 “ is a crime merely ecclesiastical.” *Constit. X. Bull. Rom. Tom. I. p. 453.*

But there were some points of power introduced by this act, and given to the diocesan, which he had not at the common law, *viz.*

1. Power to arrest and imprison persons suspect of heresy, for altho the pope's decretals had before this pretended to give power of imprisonment to the diocesan, *Extr. de pœnis, cap. 3. in. 6to*, yet that power never obtained in *England*, till this act of 2 H. 4.

2. Power to set and estreat fines upon the offender.

3. Power to deliver over immediately to the temporal officer a relapsed or contumacious heretic to be burnt without expecting the king's writ *de heretico comburendo*, with this notable advantageous clause *whereupon credence shall be given to the diocesan or his commissary.*

And accordingly the bishops after this act put the same in ure by their own immediate warrant or order delivering the party to the sheriff to be executed; but yet the conclusion of their sentence ran most commonly as formerly, *viz.* appointing him to be left to the secular power, and so leaves him, but sometimes, as in the definitive sentence against the lord *Cobham, Fox, part 1. p. 734. committing him from henceforth to the secular power, and judgment to do him thereupon to death.*

Now it is true, that upon the sentence of the diocesan the sheriff or officer, or any other were not to dispute, whether the same were truly heresy or not. 1. Because it was an act within their cognizance and jurisdiction. 2. Because it is by 2 H. 4. enacted, that credence herein shall be given to the diocesan or his commissary.

But yet as to the first point of the statute, the imprisoning of persons suspect of heresy, the temporal judge had cognizance and power to determine, whether that for which the party was imprisoned by the diocesan were heresy or not; and if it appeared to the temporal judge not to be heresy, tho the diocesan had certified it to be heresy, the temporal judge might deliver the party imprisoned upon an *Habeas Corpus*, as was done *M. 5 E. 4. Rot. 143. B. R. in Keyser's case*

case (o), and the party detaining him is punishable in an action of false imprisonment, as was done in *Warner's* case (p), *M.* 11 *H.* 7. *Rot.* 327. both which cases are at large reported, *Co. P. C. cap.* 5. *p.* 42. and therefore in cases of such return upon an *Habeas Corpus*, or justification by this act in false imprisonment, the particular heresy must be set forth, what it is, that the temporal judge may judge, whether it be heresy or no.

By this statute it appears, 1. That the diocesan might convict of heresy, and thereupon the party convict be left to the secular power, which settles the doubt raised by *Fitzb. N. B.* 269. 2. That he might convict an heretic, so as to subject him to the punishment of death not only in case of relapse after abjuration, but also in case of refusal to abjure. 3. The power of convicting an heretic is not limited to the diocesan only, but also to his commissary in order to his execution by the secular power.

After this ensued the statute of 2 *H.* 5. *cap.* 7. against heretics and *Lollards*, and thereby it is enacted,

1. " That all temporal officers be sworn to destroy all heresies and errors, commonly called *Lollardy*, and that they be assisting to the ordinary, when required, at the ordinary's charge.

2. " That when persons are convict of heresy, and left to the secular power by the ordinaries or their commissaries, their lands in fee-simple shall after their death be forfeit to the king or lords, of whom they are held, others than the ordinaries and commissaries themselves, and all their goods.

3. " That the justices of the king's bench, of the peace, and assize, shall have power to inquire of such errors and heresies called *Lollardy*, and their abettors, &c. and make out process of *Capias* against them.

4. " That

(o) *Keyser's* heresy was, that being excommunicated by the archbishop of *Canterbury*; he said, that notwithstanding that, he was not excommunicated before God, for his corn yielded as well,

as any of his neighbours, 10 *H.* 7. 17.
(p) *Warner's* heresy was, that he said he was not bound to pay tithes to the curate of the parish, where he dwelt. 1 *Rot. Rep.* 110. 3 *Co. Instit.* 42.

4. “ That such *Lollards* and their indictments be deliverd
“ over by indenture to the ordinaries or their commissaries,
“ who thereupon are to proceed to their acquittal or con-
“ viction, but the indictment to be only as an information,
“ not as evidence against the offender, but the ordinaries to
“ commence their process against them, as if there were no
“ indictment.

5. “ Punishment for escapes is by forfeiture of goods and
“ seizure of lands till he return ;” and some other provisions.

This is the first law, that gave forfeiture of lands in fee-
simple of an heretic convict, and executed, and the first law,
that settled the forfeiture of their goods, tho forfeiture of
goods were *de facto* used before. (q)

Tho in some respects it enlarged the ordinary’s power, yet
it may seem some kind of curb upon them to have an in-
dictment previous, yet I find them not restrained from pro-
ceeding, tho there were no such previous indictment.

Hitherto there was no limitation or restraint, what should
be or what should not be heresy, whereupon death might be
inflicted, but the ordinary’s power was left arbitrary and un-
limited therein.

By the statute of 25 *H. 8. cap. 14.* there was a great alte-
ration made as to the point of heresy.

1. The ordinaries were not to proceed against any for
heresy without presentment or indictment thereof before the
king’s justices, or an accusation by two lawful witnesses at the
least, and that before any citation or process by the ordinary.

2. That persons convict by the ordinary of heresy, and
refusing to abjure, or having abjured relapsing, shall be burnt
by the king’s writ *de heretico comburendo* first had and ob-
tained for the same.

3. Tho it do not positively limit what only shall be here-
sy, yet it enacts what shall not be accounted heresy. 1. Speak-
ing against the authority of the pope. 2. Speaking against
spiritual laws made by the authority of the see of *Rome* re-
pugnant to the laws of this realm, or the king’s prerogative,
and indeed it was time to make this provision, the papal au-

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thority

thority being now in a great measure taken away by act of parliament.

4. Persons accused of heresy shall and may be letten to bail either by the ordinary, or in their default by two justices of the peace.

IV. By the statute of 31 H. 8. cap. 14. a farther alteration was made touching heresy.

1. Six articles are declared and enacted, i. That in the sacrament of the altar after consecration there remains no substance of bread and wine, but the substance of Christ. 2. That communion in both kinds is not necessary *ad salutem*. 3. That priests may not marry by the law of God. 4. That vows of chastity ought to be kept by the law of God. 5. That private mass is necessary to be continued. 6. That auricular confession is necessary to be retained and used.

2. That to preach or to declare, or hold opinion against the first article touching transubstantiation shall be adjudged heresy, and the persons convict thereof, their aiders, &c. convicted thereof in the form underwritten shall be adjudged heretics, and suffer death by burning without any benefit of abjuration, sanctuary, or clergy, and shall forfeit his lands to the king, as in case of high treason.

3. That if any openly preach against the last five articles, and be thereof convict or attaind by the laws underwritten, every such offender shall suffer death as a felon without benefit of clergy or sanctuary.

4. That if any person publish or declare his opinion against the five articles last mentiond, he shall for the first offense forfeit his goods, the profits of his lands during his life, and ecclesiastical promotions, and be imprisoned at the king's will, and upon the second conviction shall suffer as a felon without benefit of clergy.

5. The king is empowerd to issue commissions directed to the archbishop or bishop of the diocese, and the chancellor and others, or three of them, whereof the archbishop or bishop, or chancellor to be one, to take information by oath of twelve men, or the testimony of two lawful persons of all heresies, &c.

6. The ordinaries within their several jurisdictions to take information of heresies, and justices of peace, &c. to take inquisitions touching heresies; these informations and inquisitions to be certified to the commissioners above-mentiond.

7. The commissioners or any three of them to make process against the offenders into all the shires of *England* and *Wales*, as in case of felony, and upon their appearance shall have full power and authority to hear and determine the said offenses according to the laws of this realm and this statute.

8. Commissioners or two of them have power to bail persons accused, till trial.

9. No challenge to be admitted but for malice or enmity, trial of forein pleas by the commissioners, no eschetes to the lords, with some other clauses.

This act, tho it doth not in exprefs terms repeal the statute of 2 *H.* 5. yet it doth in a great measure alter it. 1. In point of jurisdiction, for here the proceeding to judgment is to be by commissioners under the great seal, and not by the ordinary or ecclesiastical jurisdiction. 2. The offense of heresy now in a great measure is made a secular offense, especially in the five last articles, which are made felony. 3. Tho the commissioners have power to proceed upon accusations, as well as indictment, yet the trial of the offender was to be by jury, and the words *hear* and *determine*, &c. import the same.

Thus the law stood until 1 *E.* 6. with some small variations in 34 & 35 *H.* 8. *cap.* 1. but by the statute of 1 *E.* 6. *cap.* 12. all the before-mentiond statutes, *viz.* 5 *R.* 2. 2 *H.* 4. 2 *H.* 5. 25 *H.* 8. 31 *H.* 8. 35 *H.* 8. and all other statutes made in the time of *Henry VIII.* concerning religion are repeald. (r)

By the statute of 1 & 2 *P.* & *M.* *cap.* 6. the statutes of 5 *R.* 2. 2 *H.* 4. and 2 *H.* 5. are revived; but the statutes in *Henry VIII.*'s times, repeald by 1 *E.* 6. stood still repeald, and thus

(r) So that the punishment of heresy then stood as it was at common law before any statute made against it, notwithstanding which there were some examples in this reign of persons burnt for heresy, *viz.* *Joan Becker* and *George van Parre*, who were put to death much a-

gainst the will of that good king by the over-persuasion of archbishop *Cranmer*, for which reason (as bishop *Burnet* remarks) what that archbishop afterwards suffered in the succeeding reign was thought a just retaliation on him. *Burnet's Hist. of Reformation*, Vol. II. p. 112.

thus they continued till 1 *Eliz.* and if there had needed any farther repeal of the statutes of 25 and 31 *H. 8.* besides what was done by 1 *E. 6.* yet the statute of 1 & 2 *P. & M. cap. 8. in fine* hath this clause, that was never repeald by the statute of 1 *Eliz.* nor any other statute since made, *viz.* "That the ecclesiastical jurisdiction of archbishops, bishops and ordinaries be in the same state for process of suits, punishments of crimes, and execution of censures of the church, with knowledge of causes belonging to the same, and as large in these points as the said jurisdiction was in the 20th year of *Henry VIII.*" which doubtless repeald all acts made between 20 *H. 8.* and 1 & 2 *P. & M.* in derogation or alteration of the ecclesiastical jurisdiction, or the styles or forms of their proceeding by *Henry VIII.* or *Edward VI.*

V. I come now to the time of queen *Elizabeth.*

By the act of 1 *Eliz. cap. 1.* there are these alterations:
 1. The statutes of 1 & 2 *P. & M. cap. 6. 5 R. 2. 2 H. 4. 2 H. 5.* are repeald, so that now the whole jurisdiction touching heresy stands as it did at common law, with such farther additions as are made by that statute of 1 *Eliz.*
 2. The queen, her heirs and successors to have power to issue commissions under the great seal to exercise all jurisdictions spiritual and ecclesiastical within this kingdom, and to visit, reform, redress, order, correct, and amend all errors, heresies, schisms, &c. which by any spiritual or ecclesiastical power can or may be lawfully reformed.
 3. That such commissioners shall not have power to determine any matter to be heresy, but only such as have been heretofore determined to be heresy:
 1. By the authority of the canonical scriptures.
 2. Or by any of the first four general councils, or any other general council, wherein the same was declared heresy by the express and plain words of the said canonical scriptures.
 3. Or such as shall hereafter be determined heresy by parliament with the assent of the clergy in their convocation.

Upon this statute these things are observable:

1. By this statute the antient common law was revived for the conviction of heretics, and delivering them over to the secular power, which might at common law be done ei-

ther in a provincial council; or by the dioceſan alone, and accordingly, it is ſaid *Co. P. C. cap. 5. (f)* the conviction of hereſtics was practiſed in the queen's time, but I find no particular inſtance thereof in the queen's time (*t*), but in the caſe of *Legat*, 9 *fac.* it was ſo reſolved by four judges, and accordingly put in ure, and upon ſuch a conviction before the dioceſan a writ *de heretico comburendo* might and did iſſue in the caſes of *Legat* and *Wightman* convict of *Arianism* before the dioceſan, and left to the ſecular power, who were accordingly burnt (*u*): *vide Baker's Chronicle, p. 446.*

2. There was another method of conviction of hereſy, and thereupon delivering over to the ſecular power, and execution of the offender by writ *de heretico comburendo*, namely by ſentence of the commiſſioners for eccleſiaſtical cauſes inſtituted by the ſtatute of 1 *Eliz.* but this takes not away the conviction of hereſy by the dioceſan or in a provincial council, but theſe remain as they did at common law; and thus it was done 17 *Eliz.* upon *John Peters* and *Henry Dirwert (x)*, *Flemings*, convict of hereſy before the commiſſioners for *Anabaptiſm*, and thereupon a writ *de heretico comburendo* iſſued.

3. That this act reſtored the iſſuing of a writ *de heretico comburendo (y)* according to the courſe of the common law againſt a man convict of hereſy, and reſuſing to abjure, or having abjured relapſed, and thereupon deliverd to the ſecular power.

And *note*, that this writ is no writ of courſe, nor can the chancellor or keeper iſſue this writ upon a *ſignificavit* by the commiſſioners or dioceſan without a ſpecial warrant, for that the king may ſee cauſe to ſuſpend the iſſuing thereof, or wholly ſuperſede it, or pardon the ſentence, for it may ſo fall out, that the dioceſan hath adjudged a thing to be hereſy,

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reſy,

(*f*) *p. 40.*

(*t*) That is of a conviction in a provincial council, or before the dioceſan alone, for of convictions before the commiſſioners ſome inſtances are here mentioned by our author.

(*u*) But yet ought not to have been ſo by law, according to the opinion of lord *Coke*, for that the ſtatute of 2 *H. 4. cap. 15.* which gave the writ *de heretico comburendo* was repealed, and at

common law no ſuch writ lay upon a conviction by the ordinary, 5 *Co. Rep.* 23. *a.* 12 *Co. Rep.* 56, 92.

(*x*) Their names were *John Wielmacker* and *Hendrick Ter Woort.*

(*y*) The act ſays nothing about this writ one way or other, but only repeals the ſeveral ſtatutes relating to hereſy, and ſo leaves the matter, as it was at common law.

refy, or a party to be an heretic, which in truth and reality is not fo, or it may be the party may retract, and fo be capable of mercy.

But the courfe was for the diocefan alone, if the conviction were fingly before him, or for the diocefan with the confent of the commiffioners, if the conviction were before them, by *figificavit* under the feal of the diocefan to return the conviction into the chancery, and then the fame is brought before the king and his council, and after deliberation by the king with his council a fpecial warrant iffues from the king, by the advice of his council, to the chancellor or keeper, together with the tenor of the writ *de heretico comburendo* expreffed in the warrant, and commanding the chancellor or keeper to iffue it under the great feal, which warrant is filed for the keeper's indemnity: this was the form which was ufed 17 *Eliz.* in the cafe of the *Anabaptifts* above-named; and *note*, altho the conviction were before the commiffioners, yet the diocefan was one of the commiffioners, and his feal to the *figificavit*, fo that there were the junctures of both authorities, *viz.* the authority of the diocefan according to the courfe of the common law, and of the commiffioners according to the power given by the ftatute of 1 *Eliz.* and we have reafon to believe, that the fubfequent convictions in the queen's time purfued this form, and poffibly that of *Legat's* in 9 *Fac.* might be in the fame nature, tho the refolution of the judges, upon which it feems the procefs was formed, takes notice only of the diocefan.

4. That the forfeiture of goods or lands by conviction of herefy is by this act repeald.

5. Here is the firft boundary, that was fet to the extent of herefy as to the matter thereof, what only fhall be adjudged herefy (2); and altho this clause refer exprefly only to the commiffioners, yet it is to be the meafure and rule for diocefans, and the convictions in their proceedings againft heretics.

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But

(2) And great caufe there was for this limitation, as appears from the fore-mentioned cafes of *Keyfer* and *Warner*, and others, 12 *Co. Rep.* 58. altho, as our author fays, there ftill is too great a latitude

left, fince it is unavoidable, but different interpretations will in many cafes be put even upon fcripture, fo long as the ufe of reafon and liberty of thought continues.

But it is true, it is not so particular and certain, as might have been wished, for according to the inclination of the judge possibly some would determine that to be heresy by the canonical scriptures, which possibly is not at all heresy, nor contrary to the canonical scriptures; but howsoever it brought heresy to a greater certainty than before.

Upon this statute of 1 *Eliz.* these things seem to me to be true: 1. That the *significavit* of the conviction of heresy ought to contain, even at common law, the particular heresy, whereof the party was convicted, and without such particular *significavit* no writ *de heretico comburendo* ought to issue; and the reasons are, 1. Because it concerns the highest temporal interest, that any man can have, namely his life, and for this reason even in smaller temporal concerns a general cause or return of heresy or criminality is not sufficient; it is not a sufficient cause of refusal or non-admission of a clerk to allege, that he is *criminosus* & *non idoneus*, or that he is *schismaticus inveteratus*. 5 *Co. Rep.* 58. *a.* *Specot's* case, and the reason is very well given, *coment que nappent al court la roygne a determiner schismes ou heresies, uncore l'original cause del suit esteant matter, dont le court le roy ad conusans, le cause del schisme ou heresie, purque le presentee est refuse, covient estre alledge en certain al entent le court le roy poit consult ove divines a scaver, si ceo soit schisme ou nemy*; and upon the same reason it is, that in *Keyser's* case upon an *Habeas Corpus*, and *Warner's* case upon a false imprisonment, that, altho the statute of 2 *H. 4.* enable the ordinary to arrest for heresy, it is not a sufficient return or justification to say the party was an heretic, or suspect of heresy, but he must return the particular heresy, for which he was so arrested, that the court may judge upon it; and tho the temporal court hath no original cognizance of heresy, yet it being incident to a temporal interest, namely the liberty of a man's person, the temporal court shall judge, whether it be heresy or no (*); and accordingly in those cases they did ad-
judge

(*) This is certainly agreeable to the law of the land, 2 *Co. Instit.* 615, 623. altho it be what the clergy have always disrelished, who never liked to submit their proceedings to the judgment of the king's courts, or of any authority but what was ecclesiastical, accordingly we find a decree of *Boniface V.* "Whereby
" all powers, lords temporal, and rec-
" tors with their officers are forbid to
" judge

judge that to be no heresy, which the bishop returned as an heresy, and in the one case the prisoner was discharged, and in the other case recoverd by an action of false imprisonment. *Co. P. C. cap. 5.* 2. Altho heresy be a case of ecclesiastical cognizance and jurisdiction, and as long as it only concerns ecclesiastical censures, (and so far forth only) faith is to be given to them, 'till reversed by appeal, yea altho it should in the sentence itself most evidently appear, that it was not heresy, yet as to the inflicting of death at common law they had no power, but all they could do was to commit him to the secular power, their business was then at an end; but now begins the concern of the secular power, and herein they were not, as lacqueys, only to follow what the ecclesiastical judge had done, for now the life of a subject was concerned either to be taken away or not, and that merely by the secular power, and herein the secular power had a judgment of discretion of their own, which they are to exercise, but yet cannot do it, unless the special matter of the heresy be certified to them.

2. Admit a general certificate without shewing the particular cause of heresy were good at common law, yet since the statute of 1 *Eliz.* it must be particular, because an act of parliament, which belongs to the interpretation of the common law, directs what shall be heresy and what not, and the king and his council are to give the warrant for issuing the writ, and therefore must be ascertained, whether it be an heresy within the description of this act, and the chancellor or keeper of the great seal is to affix the seal and issue the writ, and therefore ought to be satisfied by the *significavit*, that it is an heresy within that act, and if he be not, he is not to seal it, for it concerns the life of a subject; these are not

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bare

“ judge or take cognizance of heresy,
 “ it being merely ecclesiastical, or to re-
 “ fuse to execute the punishments in-
 “ joined by them, or any way directly or
 “ indirectly to hinder their process or
 “ sentence under the pain of excommu-
 “ nication, which if they obstinately lie
 “ under for a year, they are to be con-
 “ demned as heretics;” *Sext. decretal.*
l. 5. tit. 2. cap. Inquisitionis negotium;

this decree is confirmed by the general council of *Constance, sess. 45.* See the constitutions of archbishop *Boniface, cap. de impetrantibus prohibitiones, &c. cap. de malitia judicis secularis, &c. & cap. de pœna impediendum, &c.* See also archbishop *Bancroft's* objections, 2 *Co. Inst. t. 601, 609, &c. Codex Leg. Ecclesiast. Anglic. p. 1066. Pref. to Codex, p. 19.*

bare ministerial acts by the king and his council or chancellor in subservience to the ecclesiastical jurisdiction, but they are acts judicial, where they are to exercise both a legal and well warranted discretionary judgment, and therefore must have the cause before them upon the *significavit*, and not by a bare general story of a conviction of heresy, and therefore if upon the return of the *significavit*, whereby the party is convicted and sentenced either as an obstinate or relapsed heretic, it shall by the particularity of the return appear, that it is not heresy, there ought no warrant to be granted for the issuing of the writ, and if granted, yet the writ ought not to be sealed, and therefore the certificate or *significavit* must be special and certain. (*)

Again, this definition or circumscription of heresy is by an act of parliament, and tho the matter of it, *viz.* *Heresy*, be of ecclesiastical cognizance, yet the interpretation of the act of parliament is of a temporal cognizance, especially where a temporal interest, and the greatest temporal interest in the world, namely life, is concerned: we have many acts of parliament, that concern matters of ecclesiastical cognizance, as touching clergy and purgation, touching matrimony and the prohibited degrees, yet when these acts of parliament come to be expounded, the temporal judge hath the cognizance of them.

The statute of 2 H. 4. hath two notable clauses, one whereby the ordinary hath power to arrest for heresy, there is in that clause no express provision, that credence shall be given to the ordinary, and therefore if he arrest for that, which is not heresy, the arrest is unlawful, and as an incident to an interest at common law, *viz.* the liberty of the subject, the temporal court hath power to determine, whether it be heresy or not, as is above shewn: the other clause is a power committed to the ordinary to deliver over the party convicted to the sheriff to be executed without any writ *de heretico comburendo*. This was introductory of a new law, and therefore the sheriff or officer might possibly scruple not

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only

(*) The same reasoning holds in granting the writ *de excommunicato capiendo*, for that, affecting the liberty of a man's person, concerns a temporal interest.

only whether there were such a sentence (a), but whether the thing, for which the party was condemned as an heretic, were really heresy; but to avoid all difficulties of this kind this unusual clause is added, *that herein credence shall be given to the diocesan or his commissary.*

We are here in the case of an act of parliament, an act that introduceth a new circumscription of heresy, an act that concerns the life of the subject, in a business, which after the ordinary hath passed his sentence, is now wholly left to the king, who, tho he be supreme in matters ecclesiastical as well as temporal, yet in the issuing of his writ *de heretico comburendo* is looked upon by the ecclesiastical judge, as acting by his secular power, for that is the conclusion of the sentence, *viz. that he be left to the secular power*, in this he acts not ministerially but judicially, and therefore upon all accounts must have a certain return of the cause of the heresy, and if it shall appear to him, or to the chancellor, that is to seal the writ, that the return contains not any certainty of the heresy, or that, which is returned as an heresy, be not such as is described by the statute of 1 Eliz. no writ *de heretico comburendo* ought to issue, whether the conviction be by the high commission, or diocesan, or convocation. (b)

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CHAP.

(a) There could be no room for this scruple, because, unless the sheriff was present at pronouncing the sentence, the ordinary had no power by 2 H. 4. to deliver the heretic to the sheriff, nor could the sheriff proceed to execute him without a writ.

(b) Since our author wrote, altho no alteration has been made in the definition of heresy, which still subsists upon the foot of the statute of 1 Eliz. yet the severer part of the punishment is taken away, and the doubt removed, whether the party be liable to a writ *de heretico comburendo*, for by 29 Car. 2. cap. 9. this writ and all proceedings thereon, and all capital punishments in pursuance of ecclesiastical censures are utterly abolished and taken away, so that heresy is now punishable only with excommunication, (except in the case of a clergyman, who is also to be deprived and

degraded;) the civil effects of which are, that the party excommunicated is disabled from making a will, *Swinb. of Wills, part 2. §. 22.* or from suing for any debt or legacy, *Ibid. part 5. §. 6.* or doing any legal act, *Co. Lit. 133. b.* and if the party do not submit within forty days after publication, upon a *significavit* into chancery, there issues a writ *de excommunicato capiendo*, by virtue of which he may be arrested and detained in prison, till he do submit; so that there seems now to be no material difference between a simple heretic and a relapsed heretic, for excommunication not being a definitive sentence, but only a process for contempt to enforce obedience to the sentence, whenever the party complies with it by retracting, doing penance, &c. altho a relapsed heretic, he is to be absolved.

C H A P. XXXI.

Concerning homicide and first of self-killing or felo de se.

HAVING gone thro the pleas of the crown touching high treason, misprision of treason, and petit treason, the order that I have proposed leads me to consider of felony; &c. and these are of two kinds, felonies by the common law, and felonies made such by act of parliament.

Felonies by common law are such, as either concern the taking away of life, or concern the taking away of goods, or concern the habitation, or concern the obstruction of the execution of justice in criminal and capital causes, as escapes, rescues, &c.

In the first place therefore come to be considered those felonies or offenses, that relate to life or the taking away thereof without due process of law; and this again is either that, which concerns the loss of life happening to a man's self, or happening to another.

As to the first of these, namely the consideration of that offense or crime, that concerns a man's own life, where there is no other offender but the sufferer, this falls under these two heads or divisions.

I. *Homicidium sui-ipsius*, or felony of a man's self.

II. *Infortunium*, or pure accident, or at least, where no other reasonable creature is concerned in the effecting of it.

Of the former of these in this chapter.

Felo de se or *suicide* is, where a man of the age of discretion, and *compos mentis* voluntarily kills himself by stabbing, poison, or any other way.

No man hath the absolute interest of himself, but 1. God almighty hath an interest and propriety in him, and therefore

fore self-murder is a sin against God. 2. The king hath an interest in him, and therefore the inquisition in case of self-murder is *felonice & voluntarie seipsum interfecit & murderavit contra pacem domini regis.*

Co. Litt. §. 194. fol. 127. a. M. 11 Jac. Wright's case, a man to the intent to make himself impotent, and thereby to have the more colour to beg, caused another to strike off his hand, for this they were both indicted, fined and ransomed.

A man or woman as to capital offenses is of *the age of discretion* at fourteen years old: *vide quæ supra dicta sunt cap. 3.*

Compos mentis.

If he lose his memory by sickness, infirmity, or accident, and kills himself he is not *felo de se*, neither can he be said to commit murder upon himself or any other.

If a man give himself a mortal stroke, while he is *non compos*, and recovers his understanding, and then dies, he is not *felo de se*, for tho the death complete the homicide, the act must be that, which makes the offense.

P. 22 E. 3. Coron. 244. Co. P. C. 54. vide supra cap. 4. who shall be said *non compos*.

It is not every melancholy or hypochondriacal distemper, that denominates a man *non compos*, for there are few, who commit this offense, but are under such infirmities, but it must be such an alienation of mind, that renders them to be madmen or frantic, or destitute of the use of reason: a lunatic killing himself in the fit of lunacy is not *felo de se*, otherwise it is, if it be at another time.

What a *voluntary killing.*

If a man voluntarily give himself a mortal wound, and die within a year and a day of that wound, he is *felo de se*, and he cannot purge the crime, nor the forfeiture inflicted by the law, by his repenting of what he had done. *3 E. 4. 4.*

It must be simply voluntary, and with an intent to kill himself.

If *A.* with an intent to prevent a gangrene beginning in his hand doth without any advice cut off his hand, by which

he dies, he is not thereby *felo de se*, for tho it was a voluntary act, yet it was not with an intent to kill himself.

It is said *Co. P. C. p. 54.* and by Mr. Dalton, *cap. 92. (a)*, that if *A.* gives *B.* a stroke, that he falls to the ground, *B.* draws his knife and holds it up for his own defense, *A.* in haste falling upon *B.* to kill him falls upon the knife, whereby he is wounded to death, *A.* is *felo de se*, and for that they cite 44 *E. 3. 44. 44 Aff. 17.* where indeed it is adjudged, and that rightly, that *B.* is not guilty, and shall not forfeit his goods, and that it is not barely *se defendendo*, for he did not strike, only held up his knife, and so is simply not guilty; and all that *Knivett* says is, *Est prove, que le mort occise lui mesme*, and adjudged that *B.* is not guilty, nor his goods forfeit: but *Knivett* says not, that *A.* is *felo de se*, neither indeed is he, but it is only *per infortunium*.

But if *A.* had stricken at *B.* with a knife intending to kill him, and missing *B.* had stricken himself, and kild himself, there he had been *felo de se*, because that act, whereby he intended to murder *B.* shall have the same construction, if it kill himself or any other person, as it should have done, if it had taken its effect upon *B. de quo infra.*

Touching the forfeiture of *Felo de se.*

He doth not forfeit his lands nor his wife's dower.

But he doth forfeit his goods and chattles.

As to the relation of the forfeiture.

Baron and feme joint purchasers of a term for years, the husband drowns himself, the lease is forfeited, and the wife surviving shall not hold it against the king or almoner, *Plowd. Com. 260. b. Dy. 108.* Dame *Hale's* case, in which all the judges agreed, but seem to intimate different reasons: *Weston* held the relation was only to the death, but the title of the king and a common person coming together, the king's title shall be preferred, but yet they concluded, that the forfeiture relates to the first act, whereby the felony was committed, namely the throwing himself into the water, and so the king's title commenced in the life of the husband, and amounted to

a forfeiture in his life-time, when by law it was in his power either by his disposal or forfeiture, as by outlawry, to bind the interest of the wife, and therefore they say, that if a villain give himself a mortal wound, and the lord seize the goods, and then the villain die of the wound, the king shall have the goods against the lord, and with this agrees *Littleton*, 8 E. 4. 4.

That the law was well resolved in that case I do not doubt, but I am not satisfied, that the relation of the forfeiture is to the time of the stroke to all purposes, no more than in case of another felony, for suppose a man should give himself a mortal stroke and live eleven months after, how shall he support himself and his family?

But whereas in other cases of other felonies the forfeiture as to goods relates neither to the stroke, nor to the death, but to the conviction, here the forfeiture relates not barely to the presentment or inquisition, but to the death in case of a *felo de se*, for being his own executioner he prevents any formal conviction, as in other felonies.

But yet in order to this forfeiture it is necessary, that there should be a record to entitle the king, *viz.* an inquisition.

Inquisitions therefore in this case are of two kinds, *viz.* if the body cannot be seen, then it is inquisible before the justices of *oyer* and *terminer*, yea or before the justices of peace of the county, for it is a felony, and within the extent of their commission, *H. 37 Eliz. B. R. Laughton's case, Co. P. C. p. 55. (b)*, and accordingly adjudged *M. 1656. in Greeve's case.*

And so if an indictment of felony be before commissioners of *oyer* and *terminer* or gaol-delivery, &c. and a *fugam fecit* be presented, if process be made against those, that have the goods, the flight may be traversed, for it is but an inquest of office, and shall not conclude. 47 E. 3. 26.

But it is there held, that if an inquisition be taken before the coroner *super visum corporis*, that a man is *felo de se*, that inquisition shall be conclusive, and is not traversable by the executors or administrators of the deceased, *Co. P. C. p. 55.* and

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the like seems to be held by *Stamford, P. C. p. 183. b.* where a *fugam fecit* is presented before the coroner *super visum corporis*, where it is found, that a murder was committed, and the murderer fled; and yet the offender himself shall be received to plead not guilty to the indictment or inquisition before the coroner, as by daily experience it appears, tho' *Stamford* makes it there a question whether the *fugam fecit* be traversable.

And therefore I remember in the king's bench in the case of *Barclay* it was ruled, that in case of an inquest before the coroner *super visum corporis*, wherein the party was found *felo de se*, the inquisition was quashed in the king's bench, because upon examination it appeared, that the coroner refused to let the jury hear witnesses on the part of him, that was dead, to prove that he was not *felo de se*, for the coroner ought to hear evidence on both sides, partly because it was doubted, that the inquisition in this case was conclusive, and a conviction, and not traversable, and the court of king's bench, who are the sovereign coroner, did set aside that inquisition, and order the coroner to inquire *de novo super visum corporis*, because the body was yet to be viewed. *H. 1658. B. R. Barclay's case. (c)*

If an inquisition be taken before the coroner *super visum corporis*, whereby the party dead is found to have died *per infortunium*, if it is suggested on the part of the king or almoner, that he was *felo de se*, and in the king's bench a writ of *melius inquirendum* is prayed to the sheriff, it seems it ought not to be granted, because the coroner is the proper officer, and accordingly it was denied in *Pasch. 24 Car. 2.* and if granted and an inquisition taken, it hath been held void (*d*) by the statute of 28 E. 3. cap. 9. tho' many precedents of such writs are extant. *H. 37 Eliz. B. R. Croke, n. 13. Harleston's case, F. N. B. 144, 250. (e)*

But it seems, if the coroner's inquisition omit the finding of the goods of the *felo de se*, that may be supplied by a writ of *melius inquirendum* directed to the sheriff, for that is not within the statute of 28 E. 3.

But

(c) 2 Sid. 90, 101.

(d) 2 Ander. 204.

(e) Edit. 1718. p. 322, 554.

But whensoever any inquisition is taken by the sheriff by a writ or commission of *melius inquirendum*, without question that inquisition is traversable.

If an inquisition be taken before the coroner *super visum corporis de villis A. B. C. and D.* and says not *de quatuor villatis proxime adjacent'*, according to the statute of 4 E. 1. *de coronatoribus* (f), yet it hath been held the inquisition is good, because the statute is only directory. *H. 1658. B. R. Barclay's case.* (g)

But altho an inquisition taken before the coroner *super visum corporis* in the point of *felo de se* is of great authority and a sufficient record, whereupon process may be made against those, that detain the goods found in the inquisition, yet it seems to me, that it is traversable in the very point so found, for it is but an inquest of office, and whereupon the party grieved thereby can have no attain, but otherwise it is of a presentment of a *fugam fecit* before the coroner. 8 E. 4. 4.

The coroner hath power *super visum corporis* to inquire touching the murder or interfection of the party that is dead, and also of all accessaries before, and of their flight, but not of accessaries after the fact, 4 H. 7. 18. b. (h), yet the party presented before the coroner to be principal or accessary before is not convict by such presentment, but shall be arraigned and plead to the felony, and I know no difference between that and this; and it seems unreasonable, that by an inquest taken against a dead person, whereby he is found *felo de se*, that the executors, administrators, legatees, and children of the deceased should be concluded, and lose the goods of the deceased without an answer by an inquisition, which may be taken by the coroner behind their backs, and I find no book
I express

(f) This statute was but in affirmation of the common law, *Brit. 7. a.*

(g) 2 *Sid. 144.* See also the *King versus Crosse, &c.* 1 *Sid. 204.*

(h) This case says nothing directly of the coroner's power to inquire of accessaries, yet by resolving, that in case of an accessary before the fact presented before the coroner, if it was found he fled, he should forfeit his

goods, but not so in case of an accessary after the fact, it seems strongly to imply, that the coroner had jurisdiction in the one case, but not in the other; and *Stamford* says, that the judges in that case of 4 H. 7. abridged the coroner of a power, which he would have usurped in inquiring of those, who were accessaries after the murder. See to this purpose *Dalison 32.*

express in it, but the opinion of my lord Coke P. C. 55. (i), for the doubt of Mr. Stamford P. C. 183. is only upon a *fugam fecit*, and in the case of *Barclay* 1658. the court of king's bench were not satisfied, that it was conclusive.

P. 45 E. 3. *inter communia scaccarii* there was a presentment (before the coroner, as it seems, but it is not so expressed in the record) that *Walter Page felonice se submersit, & sic felo de se devenit*, and thereupon a writ issued out of the exchequer to inquire what debts were due to *Walter Page*; the sheriffs of *London* took an inquisition, whereby it was found that *Simon Long* of *Essex* was indebted to *Walter Page* at the time of his death in 40 *l.* by bill, thereupon process issued against *Simon Long* to answer the debt, who came in and confessed he owed the debt to *Walter Page*, *dicit tamen, quod domino regi reddere non debet, quia qualitercunque presentatum fuit, quod dictus Walterus Page nequiter & felonice se submersit, ut prædicitur, idem Walterus Page interfectus fuit per emulos suos, & per ipsos in quodam fossato in loco vocato the wilds in com. Surrey projectus, absque hoc, quod ipse aliqualiter se submersit*; and thereupon issue was joined, and by a jury of *Surrey* found, *quod dictus Walterus Page fuit interfectus per emulos suos, & in fossato projectus, absque hoc, quod ipse aliqualiter se submersit.*

There a traverse was taken to the presentment, which must needs be before the coroner by the whole circumstance of the case, tho the coroner be not mentiond in the record.

And with this agrees the book of 8 E. 4. 4. that the finding of one to be *felo de se* is traversable, tho found before the coroner; but indeed it holds, that a *fugam fecit* presented before the coroner is not traversable, *quia autient ley de corone.* (k)

If there be two coroners, in a county, the outlawry must be given by both, *utlagatus est per iudicium coronatorum*, yet one of them may take an inquisition *super visum corporis*, M. 6 & 7 *Eliz.* C. B. (l)

(i) See also to the same purpose *Hob.*
317.

(k) See *Stamf. Procrog.* 46. v.
(l) See *Hob.* 70.

By the statute of 3 H. 7. cap. 1. the coroner ought to return and certify the inquisitions taken by him to the next gaol-delivery, or into the king's bench.

And thus far touching *felo de se* and his forfeiture.

There is another kind of death of a man, which may be considerable in this place, namely the death of a man *per infortunium*, and this is of two kinds, *viz.*

1. Where one man is the cause of another man's death without any ill intent, and by misfortune: of this I shall treat under the distribution of homicide.

2. When a man comes to an untimely end, where no other reasonable creature concurs to it, and this is properly *per infortunium*.

As where a man falls from an horse, or house, or boat, or into a pit, or a tree or tile fall upon him and kill him, or is kild by a beast, in this case the coroner ought to take an inquiry *super visum corporis*, and also of the manner and means, how he came by his death, and of the thing, whereby it happend, and of the value thereof, because in many cases there is a forfeit belonging to the king as a deodand, whereof in the next chapter.

C H A P. XXXII.

Of deodands.

REgularly that moveable good, that brings a man to an untimely death, is forfeit to the king, and it is usually granted by the king to his almoner to distribute in charitable uses.

But they are not forfeit till the death be found, which is regularly by the coroner, and may be before the commissioners of gaol-delivery, *oyer* and *terminer*, or of the peace, if omitted by the coroner, and hence it is, that these goods, as neither the goods of felons of themselves, felons and other outlawed persons, cannot be claimed by prescription, because there must appear a title to them by matter of record, before they are forfeited.

Upon the death of a man by misadventure, &c. the inquisition ought to inquire of the goods, that occasioned the death, and the value of them, and the *Villata*, where the mischance happend, shall be charged with process for the said goods or their value, tho they were not deliverd to them (a), 3 E. 3. Cor. 298.

And this is the reason, that in every indictment of murder, manslaughter, &c. the indictment finding, that he was kild with a sword, staff, &c. ought to find also the price, viz. 5 *solidorum*, because the king is intitled to that instrument, whereby the party was kild, or the value thereof, and that, altho it were the sword of another man, and not his, that gave the stroke, Co. P. C. 57, 58. tho this doth not vitiate the indictment as to the offense itself, tho the price be omitted.

Deodands

(a) This case is cited from an *Iter* by *Fitzherbert*, who adds at the end of it, *quod mirum*.

Deodands are of two natures: 1. Such as do *movere ad mortem*. 2. Such as, tho they are *quiescentia*, yet occasion the party's death: *vide* statute 4 E. 1. *de officio coronatoris*.

1. Things moving to death: as if a beast kill a man, 8 E. 2. *Coron.* 403. if a man be cutting of a tree, and the tree fall upon another tree and break down a limb, which falls upon a man and kills him, both the limb, and the tree that fell, are deodands. 8 E. 2. *Coron.* 398.

If a man be driving of a cart, and the cart fall and kill a man, the cart and horses are a deodand, 8 E. 2. *Coron.* 388. and so if a cart run over a man and kill him, the cart and horses are forfeit, 8 E. 2. *Coron.* 403. 3 E. 3. *Coron.* 326, 342. (b), so if the timber that hangs a bell fall, and kill a man, the timber and bell are both forfeit. (c)

If a man in watering his horse is drowned, the horse is a deodand. 8 E. 2. *Coron.* 401.

If a man fall into the water, and the water carry him under the wheel of a mill, whereby he is kild, the wheel is forfeited, but not the mill. 8 E. 2. *Coron.* 389.

If a weight of earth fall upon a worker in a mine and kill him, the weight of earth is forfeit, not the whole mine. 12 R. 2. *Forfeiture* 20.

A man falls from his horse against a trunk, whereof he dies, the horse is forfeit as a deodand, but not the trunk. 3 E. 3. *Coron.* 341.

And yet I find a strong authority, that in that case the horse is not forfeited, unless he throw his rider.

Claus. 5 E. 3. *part* 2. *m.* 9. It was found by inquisition, " *Quod Willielmus Daventriæ* in parochiâ beatae *Mariæ Stroud*
" in com. *Middlesex*; cum ad-aquavit quendam equum magistri
" sui, dictusque *Willielmus* redeundo de eodem equo per in-
" fortunium cecidit, & cum eodem equo per amicos suos fe-
" mivivus deductus fuit ad hospitium prædicti magistri sui
apud

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(b) A cart met a waggon loaded upon the road, and the cart endeavouring to pass by the waggon, was driven upon an high bank and over-turned, and threw a person, that was in the cart, just before the wheels of the waggon, and the waggon ran over him and kild him; it was

resolved in this case in the home circuit by *Pollexfen* and *Gregory*, that the cart, waggon, loading, and all the horses were deodands, because they all moved *ad mortem*. 1 *Salk.* 220.

(c) 8 E. 2. *Corone* 405. *vide contra* *Rex versus Crofte*, &c. 1 *Sid.* 207.

“ apud *Fleetstreet* in suburbio *London*, & ibidem languidus.
 “ vixit usque occasum solis, quo tempore obiit ex casu præ-
 “ dicto; & quod prædictus equus tempore casûs prædicti per
 “ aliquem vel aliquam non fuit perterritus, per quod habuit
 “ occasionem recalcitrandi.

This inquisition being removed into the chancery by *Certiorari*, thereupon it was adjudged *coram rege & concilio*, quod equus prædictus tanquam deodand' regi in hoc casu non debet adjudicari, and thereupon a writ issues to the sheriffs and coroners of *London* reciting the inquisition: “ Jamque dictâ certificatione coram nobis & concilio nostro inspecta & plenius examinata, nobis & dicto concilio nostro videtur, quòd equus prædictus tanquam deodand' nobis in hoc casu non debet adjudicari,” commands the sheriff and coroners, “ quod exactionem, quam *Johanni Bleburgh* (the master of the horse) vel plegiis, vel manucaptoribus suis in hâc parte pro equo prædicto vel ejus pretio nobis tanquam deodand' reddend' fecistis, supersedeatis omnino, & distractionem in hâc parte factam sine dilatione relaxetis.” *T. R. apud Guilford* 18 *Novemb.*

Which judgment is of greater weight, than any above cited, and may be a great guide in cases of this nature, and therefore I have cited it at large: 1. It is a resolution subsequent to all those judgments, that are above-mentioned, for the last of them is the 3 *E. 3.* and this is 5 *E. 3.* Again, 2. It is a solemn judgment given in chancery *coram rege & concilio* upon great examination, and the whole case stated in the inquisition, and every man knows, that understands any thing of records of those times, that *coram rege & concilio* was the king's legal council, namely the chancellor, treasurer, keeper of the privy seal, justices of the one bench and the other, chancellor and barons of the *Exchequer*: these usually met in chancery upon such occasions under the style of *concilium*.

3. It is a judgment given by the king and council *against* the forfeiture, the whole case appearing upon the inquisition, which is of greater moment, than a judgment given for the king, because given by himself and his officers against his own interest.

2. Now touching deodands of things not moveable.

If a man be drowned in a pit, tho the pit cannot be forfeited, the coroner may charge the township to stop the pit, and make entry thereof in his rolls; and if it be not done before the next *eyre* or gaol-delivery, the township shall be amerced. 8 E. 2. *Coron.* 416.

If a man falls from an hay-rick, whereby he dies, it is said (*nota*, not adjudged) that it shall be forfeit. 3 E. 3. *Coron.* 348.

If a man be getting up a cart by the wheel to gather pluns, and neither the cart nor horses moving, the man falls and dies, neither the cart nor horses are forfeit, but only the wheel. 8 E. 2. *Coron.* 409.

It seems, that if a man be under the age of fourteen years, and falls from a cart or horse, it shall not be a deodand, because he was not of discretion to look to himself; but if a horse, bull, or the like kill him, or if a cart run over him, there it shall be a deodand, 8 E. 2. *Coron.* 389. *Stamford's P. Cor.* 21. a. *Co. P. C.* p. 57. for there it shall be imputed to the neglect of the keeper of the goods, that did the mischief; and so it is, if a tree fall upon one within the age of discretion, it is a deodand.

Touching deodands in ships or boats, these things are observable:

1. If a ship or boat be laden with merchandize, tho it fall out that a man be kild by the motion of the ship or boat, yet the merchandize are no deodand, tho it be in the fresh water; but if any particular merchandize fall upon a party, whereby he dies, that particular merchandize shall be a deodand, and not the ship. *Britton, cap. 1. de office de coroner,* §. 13 & 14.

2. If a ship or vessel be sailing upon the sea, and a person fall out of the ship and is drowned, the ship is no deodand.

By the antient constitutions of the admiralty it seems, that if a man were drowned upon the sea by falling off from the ship under sail, there was no deodand due, nor if he died by the fall of a mast or sail-yard, or otherwise; but indeed in the articles of inquiry in the court of admiralty, mentiond in the black book of the admiralty, one of the articles is to in-

quire of them; that take any deodands, besides the admiral, of any gold, silver or jewels found upon any man slain upon the sea, drowned in the sea, or slain with a mast in the ship, or with the yard of the ship, or with any other thing, which is the cause of the death of any man, that in such case *appurtient al admiral per prendre & administrer per l'alme, ce quest mort, le moiety, & l'autre moiety à doner al feme celui, quest mort, ses infans, freres au soers, fil ad aucunes*: but certainly this never obtaind, for without question the goods of the deceased were no deodands, but only the goods that moved to his death.

Rot. Par. 51 E. 3. n. 73. The commons pray, *Que come il ad un custome use parmy cest realme, que si ascun home ou garson eschie hors de ascun niefe, batelle, ou autre vessel en le mere, haven, ou autre ewe, & soit perisse, le dit vessel ad estre forfeite au roy, ou autres seigneurs de franchises, to the great prejudice of mariners and shipping, and therefore pray, que nul neife, batell, ne autre vessel soit forfeitable desormes pur le cause avant dit.*

Resp. *En le mere ne doit pas deodand estre ajugge, mes quant al ewe fresh le roy ent ferra sa grace, ou lui pleyst.*

The like petitions were renewed Rot. Par. 1 H. 4. n. 154. 1 H. 5. n. 35. 14 H. 6. n. 26. but they obtaind no other answer, than that the law be observed.

Yet that answer in 51 E. 3. is a sufficient declaration, that no deodand is to be upon such a death happening upon the sea, and with this difference touching the forfeiture of a ship or other thing, as deodands *in mari* & *in aquâ dulci*, agrees Bract. Lib. III. cap. 5. p. 122. and cap. 17. p. 136. *in fine, viz. that de submersis in aquâ dulci batelli, de quibus tales submersi fuerunt, apprecientur, sed non in mari, nec sunt deodanda ex infortunio in mari.*

And with the same agrees Fleta, Lib. I. cap. 25. §. 9. *de submersis, si de molendino ceciderit vel carecta vel de batello, quamvis carcatis, dum tamen in aquâ dulci, secus quam in salsa,* and goes farther, but too far, *viz. that the vessel with its lading, and the cart with its lading, and the mill, with all that is moveable in it, are deodands.*

But now, what shall be said the sea or salt water?

My lord Coke, *ubi supra*, viz. p. 58. saith, and that truly, the arm of the sea is included herein; and by the book of 22 *Affize*, pl. 93. so far as the sea flows and reflows is an arm of the sea.

And thus far of deodands.

I shall only add this one thing more relating to the coroner's office touching those, that come to a violent death *de subito mortuis*: if the township bury the body before the coroner be sent for, the township shall be amerced; and if the coroner come not to make his inquiry upon notice given, he shall be fined in *eyre*, or in the king's bench, or before the justices of gaol-delivery.

C H A P. XXXIII.

Of homicide, and it's several kinds, and first of those considerations that are applicable, as well to murder as manslaughter.

HAVING dispatched the business of *suicidium* or self-murder, and *per infortunium simplex*, I come now to consider of homicide, as it relates to others.

And this is of three kinds: 1. Purely voluntary, viz. murder and manslaughter. 2. Purely involuntary, as that other kind of homicide *per infortunium*. 3. Mixt, partly voluntary, and partly involuntary, or in a kind necessary, and this again of two kinds, viz. inducing a forfeiture, as *se defendendo*, or not inducing a forfeiture, as, 1. In defense of a man's house. 2. Defense of his person against an assault *in viâ regiâ*. 3. In advance-

advancement or execution of justice, and according to this distribution I shall proceed.

I shall begin with those matters considerable, which are applicable as well to homicide, as to murder.

Murder is a killing of a man *ex malitiâ præcogitatâ*; homicide is killing a man without forethought malice.

It is a mistake in those, that think, that before the statute of Marlebridge, cap. 26. all killing of a man, tho' *per infortunium* or *se defendendo*, was murder, for the statute saith, that *murdrum de cætero non adjudicetur coram justiciariis, ubi infortunium tantummodo adjudicatur, sed locum habet murdrum de interfectis per feloniam tantum, & non aliter*, and therefore they thought that before this statute a man should be hanged for killing another in his own defence. 21 E. 3. 17. b. (a)

But the truth is, *murdrum* in this case was but an amercement, that was antiently imposed upon a township, where the death of a man happend (b); and this appears by many hundred old charters of the kings of England, especially to bishops and monasteries, whereby it was granted, that they and their possessions should be quit *de murdro & latrocinio* among divers other immunities, whereby we must not think that they had power granted them to commit murder or theft, but they were thereby acquitted of those common ameracements, usually in those antient times imposed in eyre upon villis for murder and theft committed there.

To make up the crime of homicide or murder there must be these three concurring circumstances.

1. The party must be kild, antiently indeed a barbarous assault with an intent to murder, so that the party was left for dead, but yet recoverd again, was adjudged murder, and

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petit

(a) See also 2 Co. Instit. p. 148. who is of that opinion.

(b) This is so plain, that it is matter of surprize, that any should mistake it; the word *murdrum* usually signifying a secret killing of another, so that the murderer was not known, for if the murderer was known, it was not in this sense murder; as if the murderer was taken, & *judicium sustinuerit, nullum erit murdrum, quia convincitur feloniam*, or if the murdered person lived for some

time after his wounds, it was no murder, because he might discover the murderers, the meaning of which is not, that the offender would not in those cases be liable to be indicted and punished for murder, but that the vill or township would not in such cases be liable to any amerciamento. *Bracl. Lib. III. de corona, cap. 15. p. 135. a. Wilk. Leg. Anglo-Sax. p. 280. vide supra p. 39. in notis, vide postea cap. 35.* See also *Kelynge*

petit treason, 15 E. 2. *Coron.* 383. but that holds not now, for the stroke without the death of the party stricken, nor the death without the stroke or other violence makes not the homicide or murder, for the death consummates the crime.

It remains therefore to be considered, to what intents the offense of murder or manslaughter relates to the stroke or other cause of the death, and to what purposes it relates to the death only.

If a man give another a mortal stroke, and he lives a month, two or three, or more, and die within the year and day, the title of the lord by eschete to avoid mesne incumbrances relates to the stroke given, and not only to the death. *Plowd. Com.* 263. *Dame Hale's case.*

If a man give another a mortal stroke, and he dies thereof within a year and a day, but mesne between the stroke and the death there comes a general pardon, whereby all misdemeanors are pardoned, this doth pardon the felony consequentially, because the act, that is the offense, is pardoned, tho it be not a felony till the party die. *Ibid.* 401. *Cole's case.*

If a mortal stroke be given on the high sea, and the party comes to land in *England* and die, the admiral shall not have jurisdiction in this case to try the felon, because the death, that consummated the felony, happend upon the land, nor the common law shall not try him, because the stroke, that made the offense, was not *infra corpus comitatûs*, 5 *Co. Rep.* 106. *b.* *Sir Henry Constable's case*, 2 *Co. Rep.* 93. *a.* *Bingham's case*, *Co. P. C.* p. 48. and *Lacie's case* 25 *Eliz.* cited there to that purpose; *de quo alibi.*

At common law, if a man had been stricken in one county and died in another, it was doubtful whether he were indictable or triable in either, but the more common opinion was, that he might be indicted, where the stroke was given, for the death is but a consequent, and might be found tho in another county. 9 E. 4. 48. 7 H. 7. 8. and if the party died in another county, the body was removed into the county, where the stroke was given, for the coroner to take an inquest *super visum corporis*, 6 H. 7. 10. but now by the statute of 2 & 3 E. 6. cap. 24. the justices or coroner of the county,

where the party died, shall inquire and proceed, as if the stroke had been in the same county, where the party died.

On the other side, as to some respects, the law regards the death as the consummation of the crime, and not merely the stroke.

If a party be kild in one county, the coroner *super visum corporis* might at common law inquire of all accessaries or procurers before the fact, tho the procurement were in another county, 20 H. 7. *Kelw.* 67. b. *per omnes justiciarios Angliæ*; but now by the statute of 2 & 3 E. 6. cap. 24. the indictment and trial of the accessaries shall be in the county, where they were accessary, *viz.* procuring, abetting or receiving.

If a party be mortally wounded, and the offender taken and in the custody of the constable, and he suffer him to escape before the wounded person die, it is not felony in the constable, tho he die after within the year. 11 H. 4. 12. *Plow. Com.* 401. *Cole's case.*

If a stroke be given the 1st of *January*, and the party die the 1st of *March* following, the year and day to bring an appeal is to be accounted from the death, and not from the stroke, contrary to the opinion of *Stamford P. C.* 63. a. *quod vide Co. P. C.* p. 53. & *sur statute de Glouc. cap. 9. (c)*, 4 *Co. Rep.* 42. b. *Haydon's case, Statut.* 3 H. 7. cap. 1.

If A. give a mortal stroke the 1st of *January*, and the party lives till the 1st of *February*, and then dies of the stroke, the conclusion of the indictment is best, *Et sic prefatus A. &c. modo & formâ predictâ interfecit & murdravit*, because it applies to the whole case. 2. But if it be, *Et sic prefatus A. predicto 1 Januarii ipsum, &c. interfecit & murdravit*, it is naught, because it is no murder till the party dies, 4 *Co. Rep.* 42. *Haydon's case, vide ibidem Katharine Hume's case.* 3. But if it conclude, *Et sic prefatus A. ipsum, &c. predicto 1 Februarii interfecit & murdravit*, it is good, because then the murder is complete, 4 *Co. Rep.* 47. a. *Wigge's case*, tho in such a case of a stroke at one day or one place, and a death at another day or place, the best conclusion, and that which

which is in common use at this day is, *Et sic prædictus A. ipsum, &c. modo & forma prædictis interfecit & murdravit.*

And thus far touching the relation to the stroke or death,

Now what shall be said a killing and death within the year and day.

If a man give another a stroke, which it may be, is not in itself so mortal, but that with good care he might be cured, yet if he die of this wound within the year and day, it is homicide or murder, as the case is, and so it hath been always ruled.

But if the wound or hurt be not mortal, but with ill applications by the party, or those about him, of unwholesome salves or medicines the party dies, if it can clearly appear, that this medicine, and not the wound, was the cause of his death, it seems it is not homicide, but then that must appear clearly and certainly to be so.

But if a man receives a wound, which is not in itself mortal, but either for want of helpful applications, or neglect thereof, it turns to a gangrene, or a fever, and that gangrene or fever be the immediate cause of his death, yet this is murder or manslaughter in him, that gave the stroke or wound, for that wound, tho it were not the immediate cause of his death, yet, if it were the mediate cause thereof, and the fever or gangrene was the immediate cause of his death, yet the wound was the cause of the gangrene or fever, and so consequently is *causa causati*.

If a man be sick of some such disease, which possibly by course of nature would end his life in half a year, and another gives him a wound or hurt, which hastens his end by irritating and provoking the disease to operate more violently or speedily, this hastening of his death sooner than it would have been is homicide or murder, as the case happens, in him, that gives the wound or hurt, for he doth not die simply *ex visitatione dei*, but the hurt that he receives hastens it, and an offender of such a nature shall not apportion his own wrong, and thus I have often heard that learned and wise judge justice Rolle frequently direct.

If a man either by working upon the fancy of another, or possibly by harsh or unkind usage put another into such passion of grief or fear, that the party either die suddenly, or contract some disease, whereof he dies, tho as the circumstances of the case may be, this may be murder or manslaughter in the sight of God, yet *in foro humano* it cannot come under the judgment of felony, because no external act of violence was offerd, whereof the common law can take notice, and secret things belong to God; and hence it was, that before the statute of 1 *Fac. cap.* 12. witchcraft or fascination was not felony, because it wanted a trial, tho some constitutions of the civil law make it penal.

If a physician gives a person a potion without any intent of doing him any bodily hurt, but with an intent to cure or prevent a disease, and contrary to the expectation of the physician it kills him, this is no homicide, and the like of a chirurgeon, 3 *E. 3. Coron.* 163. And I hold their opinion to be erroneous, that think, if he be no licensed chirurgeon or physician, that occasioneth this mischance, that then it is felony, for physic and salves were before licensed physicians and chirurgeons; and therefore if they be not licensed according to the statute of 3 *H. 8. cap.* 11. or 14 *H. 8. cap.* 5. they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter.

These opinions therefore may serve to caution ignorant people not to be too busy in this kind with tampering with physic, but are no safe rule for a judge or jury to go by: we see the statute of 34 & 35 *H. 8. cap.* 8. dispenseth with the penalty of those former statutes, as to outward applications and medicines for agues, stone, or strangury, which may be administerd by any person, and the preamble of the statute tells us, that if none but licensed chirurgeons should be used in many cases, many of the king's subjects were like to perish for want of help.

But if a woman be with child, and any gives her a potion to destroy the child within her, and she take it, and it works so strongly, that it kills her, this is murder, for it was not

given to cure her of a disease, but unlawfully to destroy her child within her, and therefore he, that gives a potion to this end, must take the hazard, and if it kill the mother, it is murder, and so ruled before me at the assizes at *Bury* in the year 1670.

And certainly if that opinion should obtain, that if one not licensed a physician should be guilty of felony, if his patient miscarry, we should have many of the poorer sort of people, especially remote from *London*, die for want of help, lest their intended helpers might miscarry.

This doctrine therefore, that if any die under the hand of an unlicensed physician, it is felony, is apochryphal, and fitted, I fear, to gratify and flatter doctors and licentiates in physic, tho it may, as I said, have its use to make people cautious and wary, how they take upon them too much in this dangerous employment.

If a man have a beast, as a bull, cow, horse or dog, used to hurt people, if the owner know not his quality, he is not punishable, but if the owner be acquainted with his quality, and keep him not up from doing hurt, and the beast kill a man, by the antient *Jewish* law (*) the owner was to die for it, *Exod.* xxi. 29. and with this seems to agree the book of 3 *E.* 3. *Coron.* 311. *Stamf. P. C.* 17. a. wherein these things seem to be agreeable to law.

1. If the owner have notice of the quality of his beast, and it doth any body hurt, he is chargeable with an action for it.

2. Tho he have no particular notice, that he did any such thing before, yet if it be a beast, that is *feræ nature*, as a lion, a bear, a wolf, yea an ape or monkey, if he get loose and do harm to any person, the owner is liable to an action for the damage, and so I knew it adjudged in *Andrew Baker's* case, whose child was bit by a monkey, that broke his chain and got loose.

3. And therefore in case of such a wild beast, or in case of a bull or cow, that doth damage, where the owner knows of it, he must at his peril keep him up safe from doing hurt, for tho he use his diligence to keep him up, if he escape and do harm, the owner is liable to answer damages.

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4. But

(*) *Vide supra p. 3. in notis.*

4. But as to the point of felony, if the owner have notice of the quality of the ox, &c. and use all due diligence to keep him up, yet the ox breaks loose and kills a man, this is no felony in the owner, but the ox is a deodand.

5. But if he did not use that due diligence, but thro negligence the beast goes abroad after warning or notice of his condition, and kills a man, I think it is manslaughter in the owner.

6. But if he did purposely let him loose, or wander abroad with design to do mischief, nay tho it were with design only to fright people and make sport, and it kill a man, it is murder in the owner, and I have heard, that long since at the assizes held at *St. Albans* for *Hertfordshire* it was so ruled, and the owner hanged for it, but this is but an hearsay.

If a man lay poison to kill rats, and a man casually take it, whereby he is poisoned, this is no felony, but if a man lay poison to the intent that *B.* should take it, to be poisoned therewith, and *C.* by mistake takes it, and is poisoned to death, this is murder, tho it were not intended for him. *Dalt. cap. 93. (d).* *9 Co. Rep. 81. b.* *Agnes Gore's case, Plowd. Com. 474. Saunder's case.*

And altho the party take the poison himself by the persuasion of another in the absence of the persuader, yet it is a killing by the persuader, and he is principal in it, tho absent at the taking of it. *4 Co. Rep. 44. b. Vauxe's case.*

If *A.* gives poison to *B.* intending to poison him, and *B.* ignorant of it give it to *C.* a child, or other near relation of *A.* against whom he never meant harm, and *C.* takes it and dies, this is murder in *A.* and a poisoning by him, *Plowd. Com. 474. a. Dalt. cap. 93.* but *B.* because ignorant, is not guilty.

If *A.* gives purging comfits to *B.* to make sport, and not to hurt him, and *B.* dies thereof, it is a killing by *A.* but not murder, but manslaughter. *Dalt. cap. 93.*

There are several ways of killing, 1. By exposing a sick or weak person or infant unto the cold to the intent to destroy him, *2 E. 3. 18. b.* whereof he dieth. 2. By laying an impotent person abroad, so that he may be exposed to and receive

ceive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it, and kills it. 6 Eliz. *Crompt. de Pace* 24. *Dalt. cap.* 93. (e). 3. By imprisoning a man so strictly that he dies, and therefore where any dies in gaol, the coroner ought to be sent for to inquire of the manner of his death. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noisome and poisonous filth at a man's door, to the intent by a poisonous air to poison him, *Mr. Dalton, cap.* 93. out of *Mr. Cook's* reading. 8. By strangling or suffocation.

Moriendi mille figura.

A man infected with the plague, having a plague sore running upon him, goes abroad, this is made felony by the statute of 1 Jac. *cap.* 31. but is now discontinued (f); but what if such person goes abroad to the intent to infect another, and another is thereby infected and dies? whether this be not murder by the common law might be a question, but if no such intention evidently appear, tho' *de facto* by his conversation another be infected, it is no felony by the common law, tho' it be a great misdemeanor, and the reasons are,

1. Because it is hard to discern, whether the infection arise from the party, or from the contagion of the air, it is God's arrow, and

2. Nature prompts every man, in what condition soever, to preserve himself, which cannot be well without mutual conversation.

3. Contagious diseases, as plague, pestilential fevers, small-pox, &c. are common among mankind by the visitation of God, and the extension of capital punishments in cases of this nature would multiply severe punishments too far, and give too great latitude and loose to severe punishments.

II. The second consideration, that is common both to murder and manslaughter, is, who shall be said a person, the killing of whom shall be said murder or manslaughter.

(e) *New Edit. cap.* 145. p. 469.

(f) It was made at first to continue no longer, than until the end of the first session of the next parliament.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is kild, it is not murder nor manslaughter by the law of *England*, because it is not yet *in rerum natura*, tho it be a great crime, and by the judicial law of *Moses* (g) was punishable with death, nor can it legally be known, whether it were kild or not, 22 *E.* 3. *Coron.* 263. so it is, if after such child were born alive, and baptized, and after die of the stroke given to the mother, this is not homicide. 1 *E.* 3. 23. *b.* *Coron.* 146.

But if a man procure a woman with child to destroy her infant, when born, and the child is born, and the woman in pursuance of that procurement kill the infant, this is murder in the mother, and the procurer is accessory to murder, if absent, and this whether the child were baptized or not. 7 *Co. Rep.* 9. *Dyer* 186.

The killing of a man attaint of felony, otherwise than in execution of the sentence by a lawful officer lawfully appointed, is murder or manslaughter, as the case happens, and tho there was some doubt, whether the killing of a person outlawed of felony were homicide or no, 2 *E.* 3. 6. yet it is homicide in both cases. 27 *Affiz.* 41. *Coron.* 203.

If a person be condemned to be hanged, and the sheriff behead him, this is murder, and the wife may have an appeal. 35 *H.* 6. 58. (b)

If a man be attaint in a *præmunire*, whereby he is put out of the king's protection, the killing of him was held not homicide. 24 *H.* 8. *B. Coron.* 197. but the statute of 5 *Eliz.* cap. 1. (i) hath now put that out of question declaring it to be unlawful. (k)

If a man kill an alien enemy within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.

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(g) *Exod.* xxi. 22.

(b) See also *Co. P. C.* p. 52. *quære*, in case of treason, (where the sentence is, that the party shall be hanged, but not till he be dead, &c.) if the king remit all, but the hanging, whether it be not

murder in the sheriff to hang him till he be dead?

(i) *In fine.*

(k) See *Coron.* 203. where it is declared felony to kill one outlawed for felony.

III. The third inquiry is, who shall be said a person killing.

An infant under the age of fourteen years in presumption of law is supposed without discretion, and therefore *primâ facie* he cannot commit murder or manslaughter, but being indicted thereof, upon not guilty pleaded he ought to be found not guilty.

But if he be above that age, in presumption of law he is of discretion, and may be guilty.

But if he be under the age of fourteen, yet if upon circumstances it can appear, that he hath discretion, he may be convict of felony. 3 *H. 7. 1. b. 12. a. (l)*

If a man be *non compos mentis*, and kill a man, he is to plead not guilty, and shall be acquitted, and is not driven to purchase a pardon, tho antiently it was so used. *Stamford's P. C. 16. b. & libros ibi.*

And the same law it is of a lunatic, that kills a man in the time of his lunacy; but if it be in those intervals, when he hath his understanding, then he is a felon, *sed de his supra. p. 31.*

If there be an actual forcing of a man, as if *A.* by force take the arm of *B.* and the weapon in his hand, and therewith stabs *C.* whereof he dies, this is murder in *A.* but *B.* is not guilty. *Dalt. cap. 93. p. 242. (m). Plowd. Com. 19. a.*

But if it be only a moral force, as by threatning, duress, or imprisonment, &c. this excuseth not.

A *feme covert* is in law under the coercion of her husband, and therefore, if she commit larciny or burglary together with her husband, the husband is in law guilty, but regularly the wife is not guilty. *Stamf. 26. a. Coron. 160. Dalt. cap. 104. p. 267. (n)*

But if she commit murder, or treason, or manslaughter, it is no plea to say she did it by coercion of her husband, but she is guilty, tho committed with her husband. *Dalt. Ibid.*

(l) *Vide supra, p. 27. cap. 157. p. 503.*

(m) *New Edit. cap. 145. p. 473.*

(n) *New Edit.*

C H A P. XXXIV.

*Concerning commanding, counselling, or
abetting of murder or manslaughter.*

ALtho this title may seem more proper under the title of *principal* and *accessaries*, yet because it relates to the inquiry, who shall be said a murderer or manslayer, and is common in some respects to both crimes, I shall take up the consideration thereof here.

He, that counsels, commands, or directs the killing of any person, if he be absent, is an accessary to murder before the fact.

In case of poisoning, he that counsels another to give poison, if that other doth it, the counsellor, if absent, is but accessary before. *Coke P. C. p. 49.* Sir *Thomas Overbury's* case. (a)

But he that actually gives or lays the poison to the intent to poison, tho' he be absent, when it is taken by the party, yet he is principal, and this was *Weston's* case (b), *Co. P. C. p. 49.* in Sir *Thomas Overbury's* case, and 4 *Co. Rep. 44. b.* *Vaux's* case.

In case of murder, he, that counselled or commanded before the fact, if he be absent at the time of the fact committed, is accessary before the fact, and tho' he be in justice equally guilty with him, that commits it, yet in law he is but accessary before the fact, and not principal.

If *A.* command *B.* to beat *C.* and he beat him so that he die thereof, it is murder in *B.* and *A.* if present, is also guilty of the offense, if absent, he is accessary to murder. *Dalt. cap. 93. (c).* *Plowd. Com. 475. b.* *Co. P. C. p. 51.* 3 *E. 3. Coron.* 314.

If

(a) See *State Tr. Vol. I. p. 331.*
Edit. cap. 145. p. 472.

(b) *State Tr. Vol. I. p. 313.*

(c) *New*

If *A.* counsel *B.* to poison his wife, *B.* accordingly obtains poison from *A.* and gives it his wife in a roasted apple, the wife gives it to a child of *B.* not knowing it was poison, who eats it and dies, this is murder in *B.* tho he intended nothing to the child. *Plowd. Com.* 474. *Saunder's case*: and so it is, if an apothecary send a potion to the wife, and the husband mingle poison with it, and upon some dislike of the physic the apothecary is sent for, who to justify it to be wholesome voluntarily eats part of it, and is poisoned and dies, this is murder in *B.* tho the apothecary was never intended to be hurt, but voluntarily took it. 9 *Co. Rep.* 81. *Agnes Gore's case.*

But in this case, he, who was absent, and counselled the poisoning of the wife, is not accessory to the murder, because as to him the command shall not be construed further, than as to the person intended by him. *Plowd. Com.* 474. *Saunder's case.* (*d*)

If *A.* counsel or command *B.* to beat *C.* with a small wand or rod, which could not in all human reason cause death, if *B.* beat *C.* with a great club, or wound him with a sword, whereof he dies, it seems, that *A.* is not accessory, because there was no command of death, nor of any thing, that could probably cause death, and *B.* hath varied from the command in substance, and not in circumstance.

If *A.* command or counsel *B.* to kill *C.* and before the fact done *A.* repents, and comes to *B.* and expressly discharges him from the fact, and countermands it, if after this countermand *B.* doth it, it is murder in *B.* but *A.* is not accessory, but if *A.* repent of it, but before any discharge or countermand given to *B.* *B.* kills *C.* yet *A.* remains accessory notwithstanding his private repentance, for in as much as his express counsel or command occasions the fact, he must at his peril see, that he countermand *B.* and so remedy as much as in him lies the mischief,

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(*d*) But tho the judges were of opinion in this case, that he was not accessory, yet they thought it properest, that he should be deliverd rather by a pardon, than otherwise, and accordingly they kept him in prison from one session till another, till he procured a pardon;

and master *Plowden*, the reporter, says, it was his opinion, that whoever counsels or commands an evil thing, should be adjudged accessory to all, which follows from that evil action, but not from any other distinct thing.

mischiefe, that his former command occasioned. *Co. P. C. p. 51. Plowd. Com. 476. a. Saunder's case.*

In manslaughter there can be no accessaries before the fact, for it is presumed to be sudden, for if it were with advice, command, or deliberation, it is murder and not manslaughter, and the like of *se defendendo*.

And therefore in an indictment of manslaughter only, if others be indicted as accessaries before the fact, the indictment is void against them.

And if *A.* be indicted of murder, and *B.* as accessory before by procurement, &c. and *A.* is found guilty only of manslaughter, *B.* shall be discharged. *4 Co. Rep. 43. b. Goffe versus Bibithe and Hoell David.*

And antiently, he that struck the stroke, whereof the party died, was only the principal, and those, that were present, aiding, and assisting, were but in the nature of accessaries, and should not be put upon their trial, till he that gave the stroke were attaint by outlawry or judgment. *40 Ass. 25. 40 E. 3. 42. a.*

But at this day, and long since, the law hath been taken otherwise, and namely, that all, that are present, aiding, and assisting, are equally principal with him, that gave the stroke, whereof the party died. *4 H. 7. 18. a. per omnes justiciarios utriusque banci*, for tho one gave the stroke, yet in interpretation of law it is the stroke of every person, that was present, aiding, and assisting, and tho they are called principals in the second degree, yet they are principals, and the law was altered herein, *in tempore H. 4. Plowd. Com. 100. a.* and therefore, if there be an indictment of murder or manslaughter against *A.* that *A. felonice, &c. percussit B.* whereof he died, and that *C.* and *D.* were present, abetting, aiding, and assisting to *A. ad feloniam & murdrum &c. modo & formâ predictâ faciend'*, and *A.* appears not, but *B.* and *C.* appear, they shall be arraigned, and receive their judgment if convicted, tho *A.* neither appear, nor be outlawed. *Plowd. Com. 97 and 100. Gytyn's case.*

If *A.* be indicted as having given the mortal stroke, and *B.* and *C.* as present, aiding, and assisting, and upon the evidence

it appear, that *B.* gave the stroke, and *A.* and *C.* were only aiding and assisting, it maintains the indictment, and judgment shall be given against them all, for it is only a circumstantial variance, for in law it is the stroke of all, that were present, aiding, and abetting. *Plowd. Com. 98 a. 9 Co. Rep. 67. b. Mackally's case.*

Yet the circumstances of the case may vary the degree of the offense in those, that are in this kind parties to the homicide.

If *A.* have malice against *B.* and lies in wait to kill him, and *C.* the servant of *A.* being present, but not privy to the intent of his master, finds his master fighting with *B.* takes part with his master, and the servant or master kill *B.* this is murder in *A.* because he had malice forethought, but only homicide in *C.* *Plowd. Com. 100. b. Salisbury's case,* where it was also resolved, that where *A.* had malice against *D.* the master of *B.* but by mistake assaults and kills *B.* the servant, or having malice against *D.* the master, and *B.* his servant comes in aid of his master, and *A.* kills him, it is murder in *A.* as much as if he had kild the master, for the malice shall be carried over to make the killing of *B.* murder.

Upon an indictment of murder, tho the party upon his trial be acquit of murder, and convict of manslaughter, he shall receive judgment, as if the indictment had been of manslaughter, for the offense in substance is the same.

And upon the same reason it is in case of malice implied, if *A. B.* and *C.* be in a tumult together, and *D.* the constable comes to appease the affray, and *A.* knowing him to be the constable kill him, and *B.* and *C.* not knowing him to be the constable, come in, and finding *A.* and *D.* struggling assist and abet *A.* in killing the constable, this is murder in *A.* but manslaughter in *B.* and *C.*

To make an abetter to a murder or homicide principal in the felony, there are regularly two things requisite, 1. He must be present. 2. He must be aiding and abetting *ad feloniam & murdrum sive homicidium.*

If he were procuring, or abetting, and absent, he is accessory in case of murder, and not principal, as hath been shewn, unless in some cases of poisoning, *ut supra*.

If he be present, and not aiding or abetting to the felony, he is neither principal nor accessory.

If *A.* and *B.* be fighting, and *C.* a man of full age comes by chance, and is a looker on only, and assists neither, he is not guilty of murder or homicide, as principal in the second degree, but it is a misprision, for which he shall be fined, unless he use means to apprehend the felon. 8 E. 2. *Coron.* 395. 3 E. 3. *ibidem* 293. 14 H. 7. 31. *b.* *Stamford's P. C.* 40. *b.* *Dalton, cap.* 108. *p.* 284. (*e*)

Therefore it remains to be inquired, 1. Who shall be said to be present. 2. Who shall be said abetting, aiding or assisting to the felony.

I. As to the first: if divers persons come to make an affray, &c. and are of the same party, and come into the same house, but are in several rooms of the same house, and one be kild in one of the rooms, those that are of that party, and that came for that purpose, tho in other rooms of the same house, shall be said to be present. *Dalt. cap.* 93. *p.* 241. (*f*)

The lord *Dacre* and divers others came to steal deer in the park of one *Pelham*, *Rayden* one of the company kild the keeper in the park, the lord *Dacre* and the rest of the company being in other parts of the park, it was ruled, that it was murder in them all, and they died for it. *Crompt.* 25. *d.* *Dalt. ubi supra,* 34 H. 8. *B. Coron.* 172. (*g*)

The like in case of burglary, tho some stood at the lane's end or field-gate to watch if any came to disturb them, *Co. P. C. p.* 64. 11 H. 4. 13. *b.* yet they are said to be burglars, because present, aiding, and assisting to the burglary.

II. Who shall be said abetting, aiding and assisting.

If *A.* comes and kills a man, and *B.* runs with an intent to be assisting to him, if there should be occasion, tho *de facto* he doth nothing, yet he is principal being present, as well as *A.* 3 E. 3. *Coron.* 309. If

(*e*) *New Edit. cap.* 161. *p.* 527. (*f*) *New Edit. cap.* 145. *p.* 472. (*g*) See also *Moor* 85. *Kelynge* 56.

If divers come with one assent to do mischief, (*male faire*) as to kill, rob or beat, and one doth it, they are all principals in the felony, *Œc.* 3 *E.* 3. *Coron.* 314.

If *A.* and divers others in his company intending to rob a person charge him with felony, and as they are carrying him to gaol, some of the company rob the person attached, this is robbery in all, but if the rest of the company come without any such intent, it seems they are not guilty. 3 *E.* 3. *Coron.* 350.

If *A.* comes in company with *B.* to beat *C.* and *B.* beats *C.* that he die, *A.* is principal, but then, according to those elder times, the indictment must not be only, that he was present, aiding, and assisting, for that, as the law was then taken, makes him only accessory, but the indictment must shew the special matter, that they came to that intent, 19 *E.* 2. *Coron.* 433. but now that course is altered, and the indictment only runs, that *A.* was present, aiding, and assisting, and that is sufficient to make him principal.

So if *A.* being present command *B.* to kill *C.* and he doth it, both are principals. 13 *H.* 7. 10. *a.* (*b*)

If many be present, and one only gives the stroke, whereof the party dies, they are all principal, if they came for that purpose. 21 *E.* 4. 71. *a.*

The case of *Drayton Bassett* reported by Mr. *Crompton*, fol. 28. was this: *A.* with thirty others and more entered with force upon the manor-house of *Drayton Bassett*, and ejected *B.* his children, and servants out of the same; afterwards twenty others on the behalf of *B.* three days after, in the night, came with weapons with intent to re-enter, and one of the twenty, about ten of the clock in the night, cast fire into a thatched house adjoining to the house, whereupon one that was in the house shot off a gun, and kild one of the party of *B.* and then the rest of the party of *B.* fled, and *A.* and his company continued the forcible possession of the house for many days after, whereupon *A.* and twenty-seven more were indicted of murder,

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(*b*) This case was something more, what our author here says is more directly proved by the case in 4 *H.* 7. 18. *a.* than a bare command, for one held him, while the other kild him; but

murder, and arraigned in the king's bench, and the matter aforefaid given in evidence againſt him, and *Mich.* 22 & 23 *Eliz.* he was found guilty of manſlaughter, & *divers autres de rioters, que fueront in le meason al temps, que le home fuit tue, fueront arraigns come principals, coment que ne affent al setter del gunne ne al tuer, purceo que fueront la illoyalment assemblies, & in forcible manner gard le meason oue A. que fuit conuict.*

And conſonant to this is *Mr. Dalton*, p. 241. (i) in theſe words: “Notè alſo, that if divers perſons come in one company to do any unlawful thing, as to kill, rob or beat a man, or to commit a riot, or to do any other trefpaſs, and one of them in doing thereof kill a man, this ſhall be adjudged murder in them all, that are preſent of that party abetting him, and conſenting to the act, or ready to aid him, altho they did but look on.

A man ſeizeth the goods of a *Frenchman* in time of war, and carries them to his houſe, a ſtranger pretending to be deputy-admiral with a great multitude of men came with force to the houſe, where the goods were, and at the gate of the houſe made an aſſault upon them, that were in the houſe, a woman iſſued out of the houſe without any weapon, and is kild by one of the ſervants, who came to take the goods, by throwing a ſtone at another, that was in the gate, and the perſon, that came to ſeize the goods, ſaid, (before his coming) he would make him *a cokes* that kept the goods, and would make him to know the baſeſt in his houſe. By five judges, two ſerjeants, the queen's attorney, and ſolicitor, it was held, that if it appear, that the woman came in deſenſe of the maſter of the houſe, then it was murder in the vice-admiral and all his companions: but by other five judges contrary, for no malice was againſt the woman, and murder ſhall not be extended further, than it was intended, and the former held, that if *A.* and *B.* fight by appointment before-hand, and a ſtranger comes between them to part them. and he is kild by *A.* it is murder in him, and ſome ſaid in both, but the

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others

(i) *New Edit.* p. 472.

others *noluerunt ad hoc concordare*. *Mansell* and *Herbert's* case, *H. 2 & 3 P. & M. Dyer 128. b.*

That point, wherein the judges differed, was, whether the mistake of the person excuseth it from murder, but it seems not questiond, but all agreed it manslaughter, and that not only in him, that gave the blow, but in all the companions of that party: but now the former point is sufficiently settled, that if it had been murder, in case the man had been kild, that was meant, it is murder in killing the woman, and that, whether she came as a partizan to *Mansell*, the owner of the house, or not, *quod vide supra*: and in the last case put, in *Herbert's* case before, it is certainly murder in him, that kills the man, that comes to part them, and if it had been only a sudden quarrel, it had been manslaughter in him, that kills him, and *Dalt. cap. 93. p. 240. (k)* yea, and if the combating were by malice prepense, it is held, that the killing of him, that comes to part them, is murder in both, and both were hanged for it, because each of them had a purpose to have kild the other. *22 E. 3. Coronæ 262. Lambert* out of *Dallison's* report, *p. 217.* but that seems to me to be mistaken, it is not murder in both, unless both struck him, that came to part them; and by the book of *22 Ass. 71. Coron. 180.* (which seems to be the same case, tho more at large,) he only, that gave the stroke, had judgment, and was executed. *(l)*

And therefore it is a mistake in those, that say, if it be not known which of them did it, they shall both have judgment, for the jury ought precisely to inquire, and upon circumstances to satisfy themselves, whether the one, or the other, or both did it, and neither to acquit, nor convict both, because they know not who did it.

But to return to the aiders and abettors again.

By the cases of *Drayton Basset* and *Herbert* it appears, that if many come to commit a riotous unlawful act, if in the pursuit of that action one of them commit murder or manslaughter, they are all guilty, that are of that party, that committed

(k) *New Edit. cap. 145. p. 472.*

(l) The other doth not appear to have been before the court, but upon putting the case, the court said, he that struck is guilty of felony, but said nothing as to him, who did not strike.

mitted the disorder; wherein nevertheless these things must be observed.

1. In that case it must be intended, when one of the same party commits the murder or manslaughter upon one of the other party, or upon those, that came to appease or part them, or by due course of law to disperse them.

And therefore I have always taken the law to be, that if *A.* and *B.* have a design to fight one with another upon premeditation or malice, and *A.* take *C.* for his second, and *B.* take *D.* for his second, *A.* kills *B.* in this case *C.* is principal, as present, aiding, and abetting, but *D.* is not a principal, because he was of the part of him, that was kild, and yet I know, that some have held, that *D.* is principal as well as *C.* because it is a compact, and rely much upon the book of 22 *E.* 3. *Coron.* 262. before-mentiond, but, as I think, the law was straind too far in that case, and so it is much more in making *D.* a principal in the death of *B.* that was his friend, tho it be, I confess, a great misdemeanor, yet I think it is not murder in *D.*

And the books in all the instances of this nature say, that it is murder or manslaughter in that party, that abetted him (*), and consented to the act, but *D.* never abetted *A.* to kill *B.* but abetted *B.* indeed to have kild *A.*

2. It must be a killing in pursuit of that unlawful act, that they were all engaged in, as in the case of the lord *Dacre* before-mentiond, they all came with an intent to steal the deer, and consequently the law presumes they came all with intent to oppose all, that should hinder them in that design, and consequently when one kild the keeper, it is presumed to be the act of all, because pursuant to that intent: but suppose, that *A.* *B.* and *C.* and divers others come together to commit a riot, as to steal deer, or pull down inclosures, and in their march, upon their design, *A.* meets with *D.* or some other, with whom he had a former quarrel, or that by reason of some collateral provocation given by *D.* to *A.* *A.* kills him without any abetting by any of the rest of his company, this doth not make all the party of *A.* tho present, to be therefore

(*) *viz.* who committed the homicide,

fore aiding and abetting, and consequently principal in this murder or manslaughter, which was accidental, and not within the compass of their original intention.

But if, when they had come to steal the deer, or throw down the inclosure, any had opposed them in it either by words or actual resistance, and *A.* had kild him, it had been murder in all the rest of the company, that came with the intent to do that unlawful act, tho there were no expresse intention to kill any person in the first enterprize, because the law presumes they come to make good their design against all opposition.

And this is the reason of the book 3 *E. 3. Coron. 350.* where many came to commit a disseisin, and one was kild, and all, that were of the company, were arraigned as principals, and the fact found, and they were condemned, tho the jury said they did nothing (*de male volunt*) of malice, but were of the company; tho possibly, as the circumstances of that case were, it was only manslaughter, as in the case of *Drayton Bassett*, because it was upon a sudden, and upon a pretense of title.

3. Again, altho if many come upon an unlawful design, and one of the company kill one of the adverse party in pursuance of that design, all are principals; yet if many be together upon a lawful account, and one of the company kill another of an adverse party without any particular abetment of the rest to this fact of homicide, they are not all guilty, that are of the company, but only those, that gave the stroke, or actually abetted him to do it.

There is a common nuisance committed in the highway by *A. B. C. D.* in the vill of *M.* and *E. F. G. H. I. &c.* and twenty more of the inhabitants of *M.* come to remove the nuisance, *A. B. C.* and *D.* oppose, *F.* strikes *A.* suddenly, and kills him, *F.* is guilty of manslaughter, but the rest of the party of *F.* are not therefore guilty, barely upon this account, that they were of the company, but only such of the company, as did actually assist or abet *F.* to strike or kill *A.*

But if in truth it were no nuisance, but an act that was lawfully done by *A.* and then *A.* had been kild by *F.* all the rest of the party and company of *F.* had been guilty, that

that came with design to remove that, which they thought a nuisance, but was not, because it was a riotous and unlawful assembly.

If *A.* hath a good title to his house, or hath been in possession thereof for three years, (in which case he may detain it with force by the statute of 8 *H. 6. cap. 9.*) if any person come to rob him, or kill him, and he shoot and kill him, it is not felony, nor doth he forfeit his goods, as in case of homicide *se defendendo.* 11 *Co. Rep. 82. b. 5 Co. Rep. 91. b.*

But if *A.* comes to enter with force, and in order thereunto shoots at his house, and *B.* the possessor, having other company in his house, shoots and kills *A.* this is manslaughter in *B.* and so it is ruled 5 *Eliz.* in *Harcourt's case, Crompt. 29. a. Dalt. cap. 78. p. 105. (m). Ibid. cap. 98. p. 250. (n)*

And in this case, if *B.* shoot out of his house, and killeth *A.* I think it plain, that it is not felony in the rest of the household, nay, tho he had hired extraordinary company to help to guard his house upon such an occasion, (as by law it seems he may do, notwithstanding the opinion of *Crompton, fol. 70. a.* to the contrary, *vide 21 H. 7. 39. a. 5 Co. Rep. 91. b. Seaman's case, 11 Co. Rep. 82. b. Lewes Bowle's case*) yet this is not manslaughter in the rest of the company, because the assembly was lawful and justifiable.

And therefore, in that case, no others of the company, that are in the house, shall be said, guilty, but only such as actually abet him to do the fact; and these indeed will be principals by reason of actual abetting, but not barely upon the account of being in the house and of the same company, because the assembly to defend the house by lawful means was lawful.

But in the case of a riotous assembly to rob, or steal deer, or do any unlawful act of violence, there the offense of one is the offense of all the company, as in the case of the lord *Dacre*, and of the house of *Drayton Bassett*, where there was first a riotous and unlawful entry, and keeping possession by those that shot.

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4. If

(*m*) *New Edit. cap. 127. p. 427.*

(*n*) *cap. 150. p. 483.*

4. If there be many, that are present, abetting, aiding and assisting, tho all may, as in the cases afore shewn, be guilty of homicide, yet upon different circumstances some may be guilty of homicide, and not of murder, others may be guilty of murder; *vide* the case of *Salisbury* before, *Plowd. Com.* 101. *a.* The master assaults with malice prepense, the servant being ignorant of the malice of his master, takes part with his master, and kills the other, it is manslaughter in the servant, and murder in the master.

Upon a sudden falling out between *A.* and *B.* in the street, *A.* gathers many of his friends together to assault *B.* and *B.* doth the like, the constable, and some in his aid, comes to part the affray, and keep the peace. *A.* hath notice, that he is the constable, but divers of his company know it not, nor could reasonably or probably know it, *A.* kills the constable, this is murder in *A.* but the rest of his company, that knew it not, are not guilty of the murder.

But such of them, as knowing it to be the constable, yet abetted *A.* to kill him, are guilty of murder, those that knew it not, and yet abetted *A.* to kill him, are guilty of manslaughter; and those, that neither knew him to be the constable, nor did actually abet nor assist *A.* to kill him, are not guilty, as it seems, because this was a new emergency, and out of the bounds and verge of the quarrel, wherein they were before engaged, and such whereunto these were not privy; *quod tamen quære.*

C H A P. XXXV.

Concerning the death of a person unknown, and the proceedings thereupon.

BECAUSE this chapter as well concerns *murder* as *manslaughter*, before I come to examine the particular offences themselves, I shall subjoin a few words touching this title.

Antiently there was a law introduced by *Canutus* the *Dane*; that if any man were slain in the fields, and the manslayer were unknown, and could not be taken, the township, where he was slain, should be amerced to sixty-six marks (*), and if it were not sufficient to pay it, the hundred should be charged, unless it could be made appear before the coroner upon the view of the body, that the party slain were an *Englishman*; and this *making it appear* was various, according to the custom of several places, but most ordinarily it was by the testimony of two males of the part of the father of him, that was slain; and by two females of the part of his mother.

And this amercement was usually called *murdrum*, and the presentment and proof, that the party slain was an *Englishman*; was called *Englesbery*, and presentment of *Englesbery*.

And this was therefore provided to avoid the secret murder of the *Danes*, who were hated by the *English*, and oftentimes privily murdered; this appears by *Bracton* (a), and is transcribed out of him by *Stamf. Lib. I. cap. 10. fol. 17.*

When *William* the first came in, he found the like animosity by the *Danes* and *Saxons* against the *French* and *Normans*, who were many times secretly kild by the natives, and therefore he did in effect continue this law (†), only he applied it to the

(*) See the laws of *Edward* the confessor, *Lib. XV. & XVI.* by which it appears the amercement was XLVI marks, and not LXVI marks, as *Bracton* says, which mistake might probably be occasioned, as *Wilkins* observes in his notes *ad Leg. Anglo-Sax. p. 280.* by the

transposition of the numeral letters L and X.

(a) *Lib. III. de corona; cap. 15. p. 134. b.*

(†) *Vide Leg. Gul. Con. l. 26. & Leg. Hen. I. l. 91. Wilk. Leg. Anglo-Sax. p. 224, 280.*

the *French* and *Normans*, viz. that if a person were slain by an unknown hand, if he were a *Frenchman* or a *Norman*, the hundred was amerced, where he was found, and if they were insufficient, then the county, which was sometimes 36 l. sometimes 24 l.

And tho this was instituted for the preservation of the *French* and *Normans*, yet intermarriages happening between the natives and them, so that in process of time they became, as it were, one people, the same custom was continued as to all persons, that were kild by unknown hands, and this amerciamento was called *murdrum*.

This appears at large by the black book of the Exchequer written by *Gervasius Tilburienfis*, *Lib. I. cap. Quid murdrum, & quare fit dictum*, which expounds the true scope of the statute of *Marlbridge*, *cap. 26. Quod murdrum de catero non adjudicetur pro mortuo per infortunium*.

But as well the presentment of *Englesbery*, as the amerciamento for secret homicide by persons unknown, was taken away by the statute of 14 E. 3. *cap. 4.* yet there remained a certain amerciamento upon the township, where a person was slain, and the offender escaped, viz. If a person were slain in the day-time, in a town walled, or not walled, the town is to be amerced, if the vill be not sufficient, the hundred shall be charged, and on default of them the county.

If he be slain in the day-time out of any vill, the hundred shall be amerced, and on their disability the county shall be charged with the amerciamento.

If a man be kild either in day or night, and the offender be taken and committed to the constable, or to the vill, if he escape, the township where the party was slain, or where the offender was taken, shall be fined. (*b*)

But if a person be slain in the day or night in a walled town, and the offender be not taken, the town or city shall be fined.

If any private person be present when a murder or manslaughter is committed, and doth not his best endeavour

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to

(*b*) For the vill is not discharged, till he be deliverd into gaol, or to the custody of the sheriff, after which the sheriff will be chargeable. *Stamf. P. C. cap. 31.*

to apprehend the malefactor, he shall be fined and imprisoned.

All which differences appear by comparing the books of *Stamf. P. C. cap. 30 & 31. Coke P. C. cap. 7. p. 53. 3 H. 7. cap. 1.* and the books there cited.

C H A P. XXXVI.

Touching murder, what it is, and the kinds thereof.

MURDER and manslaughter differ not in the kind or nature of the offense, but only in the degree, the former being the killing of a man of malice prepenſe, the latter upon a sudden provocation and falling out.

And therefore it is, that upon an indictment of murder the party offending may be acquitted of murder, and yet found guilty of manslaughter, as daily experience witnesseth (a), and they may not find him generally *not guilty*, if guilty of manslaughter.

In an appeal of murder it is agreed on all hands, that the jury may find him not guilty of the murder, and guilty of manslaughter; this was accordingly ruled (b) *P. 34 Eliz. B. R. the case of Wroth and Wigges* (c). *P. 5 Jac. B. R. n. 20. Pellett and Barenden, P. 7 Jac. B. R. n. 11.* (d), but it hath been held, that altho upon an indictment of murder, if the party appear to be guilty of manslaughter, the jury ought not to acquit him generally, but find him guilty of manslaughter; yet in an appeal of murder, tho the jury may, if they please; find him guilty of manslaughter, if the fact be such, yet they may find generally, that he is *not guilty*,

5 Y because

(a) See *Dalison* 14.

(b) Or rather taken for granted.

(c) *Cro. Eliz.* 276. See also *Cro. Eliz.*

296. 1 *Sid.* 325.

(d) These two cases I do not find any where among the printed reports.

because it is the fruit of the party, and he should lay his case according to the truth.

With this agrees *H. 38 Eliz. B. R. Penryn and Corbett (c)*, *H. 38 Eliz. B. R. B. 183. (f)*, *M. 22 Jac. B. R. L. 278. Blount's case (g)*, but it was held *P. 2 Car. 1. in Bassage's case (b)*, that they may not in such case find a general verdict of *not guilty*, but must find him guilty of manslaughter, because included in murder, as well in case of an appeal, as in case of an indictment, and so it seems the law is.

The difference between the offenses of murder and manslaughter seems to rest in these particulars.

1. In the degree and quality of the offense, for murder, as hath been said, is accompanied with malice forethought, either express or presumed, but bare homicide is upon a sudden provocation or falling out.

2. And therefore in murder there may be accessaries before, as well as after, because ordinarily it is an act of deliberation, and not merely of sudden passion; but in bare homicide or manslaughter there can be no accessaries before, tho there may be accessaries after, and therefore, if an indictment be of murder against *A.* and that *B.* and *C.* were counselling and abetting as accessaries before only, (and not as present, aiding and abetting, for such are principals, as hath been said) if *A.* be found guilty only of homicide, and acquit of the murder, the accessaries before are hereby discharged.

3. The indictment of murder essentially requires these words *felonice ex malitiâ suâ præcogitatâ interfecit & murdravit*, but the indictment of simple homicide is only *felonice interfecit*.

4. Altho at common law, and by the statute of 25 E. 3. cap. 4. clergy was promiscuously allowed, as well in case of murder, as of homicide or manslaughter, yet by the statute of 23 H. 8. cap. 1. 25 H. 8. cap. 3. 1 E. 6. cap. 12. 5 & 6 E. 6. cap. 10. clergy is taken away from murder *ex malitiâ præcogitatâ*.

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Now

(c) *Cro. Eliz.* (464.)(f) I suppose this may be the case of *Goff and Byby, Cro. Eliz.* 540.(g) 2 *Roll. Rep.* 460.(b) *Latch* 126.

Now having before, *cap.* 33. declared those things, that are common to the offenses of murder and manslaughter, it remains, that I consider those things, that are specific and peculiar to murder, which is what shall be said a killing *ex malitiâ præcogitatâ*, or what in law is said such a malice, as makes the offense of killing a person thereby to be murder.

Such a malice therefore, that makes the killing of a man to be murder, is of two kinds, 1. Malice in fact, or 2. Malice in law, or *ex præsumptione legis*.

Malice in fact is a deliberate intention of doing some corporal harm to the person of another.

Malice in law, or presumed malice, is of several kinds, *viz.* 1. In respect of the manner of the homicide, when without provocation. 2. In respect of the person kild, *viz.* a minister of justice in execution of his office. 3. In respect of the person killing.

Touching the first of these in this chapter, *viz.* malice in fact.

Malice in fact is a deliberate intention of doing any bodily harm to another, whereunto by law he is not authorized.

The evidences of such a malice must arise from external circumstances discovering that inward intention, as lying in wait, menacings antecedent, former grudges, deliberate compassings, and the like, which are various according to variety of circumstances.

It must be a compassing or designing to do some bodily harm.

If there have been a long suit in law between *A.* and *B.* either touching interest or wrong done, as if *A.* sue *B.* or threaten to sue him, this alone is not a sufficient evidence of malice prepenſe, tho possibly they meet and fall out, and fight, and one kills the other, if it happen upon sudden provocation; but this may by circumstances be heightened into a malice prepenſe, as if *A.* without any new provocation strike *B.* upon the account of that difference in law, whereof *B.* dies, or *è converso*, or if he lie in wait to kill him, or come with a resolution to strike or kill him, for in such a case the difference in the law-suit, (which alone makes not malice) is coupled and joined with circumstances, that prove the purpose

pose of the party was more, than the law allows in a legal vindication of wrong done.

If there be an old quarrel betwixt *A.* and *B.* and they are reconciled again, and then upon a new and sudden falling out *A.* kills *B.* this is not murder, but if upon circumstances it appears, that the reconciliation was but pretended or counterfeit, and that the hurt done was upon the score of the old malice, then it is murder.

If there be malice by *A.* against *B.* and by *B.* against *A.* and they meet, and upon the account of that malice *A.* strikes *B.* and *B.* thereupon kills *A.* (otherwise than in his own necessary defense) it is murder in *B.* but if they meet accidentally, and *A.* assaults *B.* first, and *B.* merely in his own defence, without any other malicious design kills *A.* this is not murder in *B.* for it was not upon the account of the former malice, but upon a new and sudden emergency for the safeguard of his life; but if *A.* and *B.* had met deliberately to fight, and *A.* strikes *B.* and pursues *B.* so closely, that *B.* in safeguard of his own life kills *A.* this is murder in *B.* because their meeting was a compact, and an act of deliberation, and therefore all, that follows thereupon, is presumed to be done in pursuance thereof, and thus is *Mr. Dalton, cap. 93. p. 241. (i)* to be understood.

But yet *quere*, whether if *B.* had really and truly declined the fight, ran away as far as he could, (suppose it half a mile,) offered to yield, and yet *A.* refusing to decline it had attempted his death, and *B.* after all this kills *A.* in his own defense, whether it excuseth him from murder; but if the running away were only a pretense to save his own life, but was really designed to draw out *A.* to kill him, it were murder.

A. commands *B.* to kill *C.* and before the act done repents, and countermands *B.* and charges him not to do it, yet *B.* doth it, *A.* is not guilty. *Co. P. C. p. 51.*

A. challenges *C.* to meet in the field to fight, *C.* declines it as much as he can, but is threatned by *A.* to be posted for a coward, &c. if he meet not, and thereupon *A.* and *B.* his second,

cond, and C. and D. his second, meet and fight, and C. kills A. this is murder in C. and D. his second, and so ruled in P. 14 *Fac.* in *Taverner's* case (k), tho C. unwillingly accepted the challenge.

But it seems not to be murder in B. because tho he had malice against C. and D. his opponents, yet he had none against A. tho some have thought it to be murder also in B. because done by compact and agreement. 22 E. 3. Cor. 262. *sed quere de hoc.*

If A. challenge B. to fight, B. declines the challenge, but lets A. know, that he will not be beaten, but will defend himself; if B. going about his occasions wears his sword, is assaulted by A. and kild, this is murder in A. but if B. had kild A. upon that assault, it had been *se defendendo*, if he could not otherwise escape, or bare homicide, if he could escape, and did not.

But if B. had only made this as a disguise to secure himself from the danger of the law, and purposely went to the place, where probably he might meet A. and there they fight, and he kills A. then it had been murder in B. but herein circumstances of the fact must guide the jury.

If A. and B. fall suddenly out, and they presently agree to fight in the field, and run and fetch their weapons, and go into the field and fight, and A. kills B. this is not murder but homicide, for it is but a continuance of the sudden falling out, and the blood was never cooled, but if there were deliberation, as that they meet the next day, nay, tho it were the same day, if there were such a competent distance of time, that in common presumption they had time of deliberation, then it is murder. Co. P. C. p. 51. *Fac.* B. R. *Ferrer's* case, M. 8 *Fac.* B. R. *Morgan's* case.

A. the son of B. and C. the son of D. fall out in the field and fight, A. is beaten, and runs home to his father all bloody, B. presently takes a staff, runs into the field, being three quarters of a mile distant, and strikes C. that he dies, this is not murder in B. because done in sudden heat and passion. T. 9 *Fac.* B. R. 12 Co. Rep. p. 87. (l)

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A boy

(k) 1 *Rob. Rep.* 360. 3 *Bul.* 171.

(l) *Cro. Fac.* 296. *Royley's* case.

A boy came into *Osterly* park to steal wood, and seeing the woodward climbs up a tree to hide himself, the woodward bids him come down, he comes down, and the woodward struck him twice, and then bound him to his horse-tail, and dragged him till his shoulder was broke, whereof he died; it was ruled murder, because, 1. The correction was excessive, and 2. It was an act of deliberate cruelty. *M. 4 Car. B. R. Holloway's case. (m)*

If the master designeth moderate correction to his servant, and accordingly useth it, and the servant by some misfortune dieth thereof, this is not murder, but *per infortunium*. *Crompt. 136. b. Dalt. cap. 96. p. 245. (n)*, because the law alloweth him to use moderate correction, and therefore the deliberate purpose thereof is not *ex malitiâ præcogitatâ*.

But if the master design an immoderate or unreasonable correction, either in respect of the measure, or manner, or instrument thereof, and the servant die thereof, I see not how this can be excused from murder, if done with deliberation and design, nor from manslaughter, if done hastily, passionately, and without deliberation; and herein consideration must be had of the manner of the provocation, the danger of the instrument, which the master useth, and the age or condition of the servant, that is stricken, and the like of a school-master towards his scholar. *(o)*

The sheriff hath a warrant to hang a man for felony, and he beheads him, this is held murder, for it is an act of deliberation. *Co. P. C. p. 52.*

A man hath the liberty of *Infangthiefe (p)*, the steward of the court gives judgment of death against a prisoner against law, this was a cause of seizure of the liberty, but was not murder in the judge, *quia factum judicialiter, licet ignoranter. 2 R. 3. 10. a.* the case of the steward of the liberty of the abbot of *Crowland*.

(m) *Cro. Car. 131. W. Jones 198. Kelyng 127.*

(n) *cap. 148. p. 478.*

(o) See *Kelyng 64. 65.*

(p) See *Spelman's Glossary, p. 313.*

C H A P. XXXVII.

Concerning murder by malice implied presumptive, or malice in law.

I Have before distinguished malice implied into these kinds:
1. When the homicide is voluntarily committed without provocation. 2. When done upon an officer or minister of justice. 3. When done by a person, that intends a theft or burglary, &c.

I. Therefore touching the former of these.

When one voluntarily kills another without any provocation, it is murder, for the law presumes it to be malicious, and that he is *hostis humani generis*; it remains therefore to be inquired, what is such a provocation, as will take off the presumption of malice in him, that kills another.

He that wilfully gives poison to another, that hath provoked him or not, is guilty of wilful murder, the reason is, because it is an act of deliberation odious in law, and presumes malice.

If *A.* comes to *B.* and demands a debt of him, or comes to serve him with a *Subpœna ad respondendum* or *ad testificandum*, and *B.* thereupon kills *A.* this is murder, because it is no provocation.

Watts came along by the shop of *Brains*, and distorted his mouth, and smiled at him, *Brains* kills him, it is murder, for it was no such provocation, as would abate the presumption of malice in the party killing. *M. 42 & 43 Eliz. B. R. Brain's case. (a)*

If *A.* be passing the street, and *B.* meeting him, (there being convenient distance between *A.* and the wall,) takes the wall of *A.* and thereupon *A.* kills him, this is murder; but if *B.* had jostled *A.* this jostling had been a provocation, and would

(a) *Cro. Eliz. 778. Kel. 131.*

would have made it manslaughter, and so it would be, if *A.* riding on the road, *B.* had whipt the horse of *A.* out of the track, and then *A.* had alighted, and kild *B.* it had been manslaughter. 17 *Car.* 1. *Lanure's* case.

In the case of the lord *Morley*, 18 *Car.* 2. (*b*) all the judges met, and it was agreed by all the judges except one, that if *A.* gives slighting words to *B.* and thereupon *B.* immediately kills him, this is murder in *B.* and that such words are not in law such a provocation, as will extenuate the offense into manslaughter, and the statute of 1 *Fac. cap.* 8. of stabbing in such a case was but provisional, because the juries were apt upon any verbal provocation to find the fact to be manslaughter; but it was there held, that words of menace of bodily harm would come within the reason of such a provocation, as would make the offense to be but manslaughter.

And many, who were of opinion, that bare words of slighting, disdain, or contumely, would not of themselves make such a provocation, as to lessen the crime into manslaughter, yet were of this opinion, that if *A.* gives indecent language to *B.* and *B.* thereupon strikes *A.* but not mortally, and then *A.* strikes *B.* again, and then *B.* kills *A.* that this is but manslaughter, for the second stroke made a new provocation, and so it was but a sudden falling out, and tho' *B.* gave the first stroke, and after a blow received from *A.* *B.* gives him a mortal stroke, this is but manslaughter according to the proverb *the second blow makes the affray*; and this was the opinion of myself and some others.

There was a special verdict found at *Newgate*, viz. *A.* sitting drinking in an alehouse, *B.* a woman called him a *son of a whore*, *A.* takes up a broomstaff, and at a distance throws it at her, which hitting her upon the head kild her, whether this were murder or manslaughter was the question in *P.* 26 *Car.* 2. it was propounded to all the judges at *Serjeants-Inn*, two questions were named, 1. Whether bare words, or words of this nature, would amount to such a provocation, as would extenuate the fact into manslaughter. (*c*)

2. Admitting it would not in case there had been a striking with such an instrument, as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether this striking, that was so improbable to cause death, will not alter the case; the judges were not unanimous in it, and in respect, that the consequence of a resolution on either side was great, it was advised the king should be moved to pardon him, which was accordingly done.

A. and *B.* are at some difference, *A.* bids *B.* take a pin out of the sleeve of *A.* intending thereby to take an occasion to strike or wound *B.* which *B.* doth accordingly, and then *A.* strikes *B.* whereof he died; this was ruled murder, 1. Because it was no provocation, when he did it by the consent of *A.* 2. Because it appeared to be a malicious and deliberate artifice thereby to take occasion to kill *B.*

If there be chiding between husband and wife, and the husband strikes his wife thereupon with a pebble, that she dies presently, it is murder, and the chiding will not be a provocation to extenuate it to manslaughter. 43 *Eliz. Crompt.* fol. 120. a. (d)

II. The second kind of malice implied is, when a minister of justice, as a bailiff, constable, or watchman, &c. is kild in the execution of his office, in such a case it is murder.

If the sheriff's bailiff comes to execute a process, but hath not a lawful warrant, as if the name of the bailiff, plaintiff, or defendant be interlined or inserted after the sealing thereof by the bailiff himself, or any other, if such bailiff be kild, it is but manslaughter, and not murder.

But if a process issuing out of a court of record to a serjeant at mace, sheriff, or other minister, be erroneous, as if a *Capias* issue, when a *Distringas* should issue, yet the killing of such a minister in the execution of that process is murder, altho he execute the process in the night (e), or upon a *Sunday* (f). *Mackally's case*, 9 *Co. Rep.* 68. a.

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But

(d) See also *Kel.* 64.

(e) 9 *Co.* 66. a.

(f) 9 *Co.* 66. b. for ministerial acts might lawfully be executed upon a *Sunday*, but since our author wrote, the law

is altered in this respect, for by 29 *Car.* 2. cap. 7. all process, warrants, &c. served or executed on a *Sunday* are void, except in cases of treason, felony, or breach of the peace, so that now an officer arresting

But if the process be executed out of the jurisdiction of the court, the killing of the minister is only manslaughter, and so it is, if the issuing of the process were void, and *coram non judice*.

A bailiff or officer *juris & conus* may arrest a man without shewing his warrant (g), and a private bailiff need not show his warrant upon the arrest, till the party arrested demand it, and therefore, if the party arrested kill a bailiff upon the arrest without such a warrant shewn, it is murder, and so it is, if a serjeant at mace makes the arrest without shewing his mace, *ibidem Mackally's case*. (b)

A bailiff *juris & conus* had a warrant to arrest *Pew* upon a *Capias*, and came to arrest him, not using any words of arrest, *Pew* said, *Stand off, I know you well enough, come at your peril*, the bailiff takes hold of him, *Pew* thrusts him through; it was ruled murder, tho he used no words of arrest, nor shewed his warrant, for possibly he had not time. *P. 6 Car. I. B. R. (i)*

A bailiff having a warrant to arrest *Cook* upon a *Capias ad satisfaciendum* came to *Cook's* house, and gave him notice, *Cook* menaceth to shoot him if he depart not, yet the bailiff departs not, but breaks open the window to make the arrest, *Cook* shoots him, and kills him; it was ruled, 1. That it is not murder, because he cannot break the house (k), otherwise it had been, if it had been upon an *Habere facias possessionem* (l). 2. But it was manslaughter, because he knew him to be a bailiff. But 3. Had he not known him to be a bailiff, or one that came upon that business, it had been no felony, because done in defense of his house. *P. 15 Car. B. R. (m)*

But if a sheriff enter the house by the outward door open, he or his bailiff may break open the inward doors, tho
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resting a man upon a warrant on a *Sunday* is, as if he had arrested him without any warrant at all.

(g) Tho the party do demand it; this is intended of the warrant constituting him bailiff; but as to the writ or process against the party, there is no difference between a public or a private bailiff, for in either case, if the party submit to the arrest, and do demand it, he

is bound to shew at whose suit, for what cause, out of what court the process issues, and when, and where returnable. *5 Co. 54. a. 9 Co. 69. a.*

(b) *9 Co. 69. a.*

(i) *Cro. Car. 183.*

(k) *5 Co. 92. b. Semayne's case.*

(l) *5 Co. 91. b.*

(m) *Cro. Car. 537. W. Jones 429.*

the proces be without a *Non omittas*, and therefore the killing of him in such case is murder. *M. 17 Jac. B. R. White and Wiltshire.* (n)

If the sberiff or bailiff have once laid hands upon the prisoner, and so began his execution, he may break open the outward doors to take him, *Sir William Fishe's case* (o), and if the warrant be directed to five bailiffs, two or three may make execution; resolved in *White's case ubi supra*.

Upon a warrant against a felon, or one that hath dangerously wounded another, or for surety of the peace, or good behaviour, the constable may break open the door, where the offender is, *Dalt. cap. 78.* (p), and so may the sberiff or his bailiff upon a *Capias utlegatum*, *Capias pro fine*, or other proces for the king, if not opend upon demand.

The constable of the vill of *A.* comes into the vill of *B.* to suppress some disorder, and in the tumult the constable is kild in the vill of *B.* this is only manslaughter, because he had no authority in *B.* as constable.

But it seems, that if the constable of the vill of *A.* had a particular precept from a justice of peace directed to him by name, or by the name of the constable of *A.* to suppress a riot in the vill of *B.* or to apprehend a person in the vill of *B.* for some misdemeanor, and within the jurisdiction and conufance of the justice of peace, and in pursuance of that warrant he go to arrest the party in *B.* and in execution of his warrant is kild in *B.* this is murder, for tho in such case it seems the constable was not bound to execute the warrant out of his jurisdiction, neither could he do it singly *virtute officii* as constable of *A.* yet he may do it as bailiff or minister by virtue of the warrant, and the killing of him is murder, as well as if he had been constable of the hundred wherein *A.* and *B.* lie, or sberiff of the county, for a justice of peace may for a matter within his jurisdiction issue his warrant to a private person, as servant; but then such person must shew his warrant, or signify the contents of it. 14 *H. 8.* 16. *a.*

And

(n) *Palmer* 52. *cap. 127. p. 426.*

(o) Cited in *White's case*; *Palmer* 53.

(p) *New Edit.*

And altho the warrant of the justice be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be within his jurisdiction as justice of peace, the killing of such officer in execution of his warrant is murder, for in such case the officer cannot dispute the validity of the warrant, if it be under seal of the justice. 14 H. 8. 16.

If *A.* and *B.* are constables of the vill of *C.* and there happens a riot or quarrel between several persons, *A.* joins with one party, and commands the adverse party to keep the peace, *B.* joins with the other party, and in like manner commands the adverse party to keep the peace, and the assistants and party of *A.* in the tumult kill *B.* it seems that this is but manslaughter, and not murder, in as much as the officers and their assistants were one engaged against the other, and each had as much authority as the other.

But if the sheriff having a writ of *Habere facias possessionem* against the house and lands of *A.* and *A.* pretending it to be a riot upon him gain the constable of the vill to assist him, and to suppress the sheriff or his bailiffs, and in the conflict the constable is kild, this is not so much as manslaughter, but if any of the sheriff's officers were kild, it is murder, because the constable had no authority to encounter the sheriff's proceeding or acting by virtue of the king's writ.

If a constable, or tithing-man, or watchman be in execution of his office, and be kild, it is murder; and in all cases of implied malice, or malice in law, the indictment need not be special, but general *ex malitiâ suâ præcogitatâ interfecit & murdravit*, and the malice in law maintains the indictment. 9 Co. Rep. 68. *Mackally's case.*

But now touching the point of notice.

1. It is not necessary to make it murder, that the party killing know the person of the bailiff, constable, or watchman.

2. If he be a bailiff *jurus & conus*, it seems there is no necessity for him to notify himself to be such by express words, but it shall be presumed, that the offender knew him, as it seems by the book 9 Co. Rep. 69. *b. Mackally's case; quere.*

3. But if it be a private bailiff, either the party must know that he is so, as in *Pew's* case before, or there must be some such notification thereof, whereby the party may know it, as by saying, *I arrest you*, which is of itself sufficient notice, and it is at the peril of the party, if he kill him after these words, or words to that effect pronounced, for it is murder, if *de facto* it fall out, that he were a bailiff, and had a warrant. 9 *Co. Rep. ubi supra*.

4. A constable coming to appease a sudden affray in the day-time in the village, whereof he is constable, it seems every man *ex officio* is bound to take notice, that he is the constable, because he is to be chosen and sworn in the leet, where all reliants are to attend, 4 *Co. Rep. 40. b. Young's case (q)*; but it is not so in the night-time, unless there be some notification, that he is the constable.

5. But whether it be in the day or night, it is sufficient notice, if he declare himself to be the constable, or command the peace in the king's name, and the like for any, that come in his assistance, or for a watchman, &c. and therefore, if any of them are kild after such a notification, it is murder in them, that kill him. 9 *Co. Rep. 68. b. Mackally's case*.

And these differences may be collected out of the books 4 *Co. Rep. 40. Young's case*, “ Et en cest case fuit tenuis *per totam curiam*, que si sur affray fait le constable & autres en son assistance veignent a suppreffer le affray & a preserver le peace, & en faisant lour office le constable ou ascun de ses assistants soit tue, ceo est murder en ley, coment que le murderer ne scavoit le party, que fuit tue, & coment que le affray fuit sodein, pur ceo que le constable & ses assistants veigne per autoritie del ley pur le garder del peace & a preventer le danger, que poit ensuer per le infreinder de ceo, & pur ceo le ley adjudgera ceo murder, & que le murderer avoit malice prepense, pur ceo, que il oppose luy mesme enconter le justice del realme, & issint de le vis-
6 B “ cont

(q) The reason here given by our author is not mentiond in this case, but it is there held, that a person's acting as constable is a sufficient notification, altho the party do not otherwise know him to be so.

“ cont, ou son bailiff, ou watchman en fesant son office.”
 And 9 Co. Rep. 69. *Mackally's* case, where it was objected, that the serjeant at mace did not shew his mace, whereby the offender might know him to be an officer; yet it was ruled, that the killing of him was murder, 1. Because it was found, that he was *serviens ad clavam, juratus & cognitus*, and a bailiff *jurus & conus* need not shew his warrant, tho demanded, nor another bailiff without demand, and when the books speak of a bailiff *jurus & conus*, it is not necessary, that he be known to the party arrested, but it is sufficient if he be commonly known. 2. “ Si notice fuit requisite il done sufficient notice, quant il dit *jeo toy arrest in le nosme le roy, &c.* “ Et le party a son peril doit luy obeyer, & fil nad loyall garrant, il poit aver son action de faux imprisonment, issint que in cest case sans question le serjant ne besoigne a monstre son mace, car sils ferra chaise a monstre lour mace, ceo ferra warning al party destre arrest a fuer.

H. 24 & 25 Car. 2. A great number of persons assembled in a house called *Sissinghurst* in *Kent*, issued out and committed a great riot and battery upon the possessors of a wood adjacent, one of their names, *viz. A.* was known, the rest were not known; a warrant was obtained from a justice of peace to apprehend the said *A.* and divers other persons unknown, which were all together in *Sissinghurst-house*, the constable, with about sixteen or twenty called to his assistance, came with the warrant to the house, and demanded entrance, and acquainted some of the persons within, that he was the constable, and came with the justice's warrant, and demanded *A.* with the rest of the offenders, that were then in the house, and one of the persons within came and read the warrant, but denied admission to the constable, or to deliver *A.* or any of the malefactors, but going in commanded the rest of the company to stand to their staves: the constable and his assistants fearing mischief went away, and being about five rod from the door, *B. C. D. E. F. &c.* about fourteen in number, issued out and pursued the constable and his assistants; the constable commanded the peace, yet they fell on and kild one of the assistants of the constable, and wounded others, and

then retired into the house to the rest of their company, which were in the house, whereof the said *A.* and one *G.* that read the warrant, were two, for which the said *A. B. C. D. E. F. G.* and divers others were indicted of murder, and tried at the king's bench bar, wherein these points were unanimously agreed.

1. That altho the indictment were, that *B.* gave the stroke, and the rest were present, aiding, and assisting, tho in truth *C.* gave the stroke, or that it did not appear upon the evidence, which of them gave the stroke, but only that it was given by one of the rioters; yet that evidence was sufficient to maintain the indictment, for in law it was the stroke of all that party according to the resolution in *Mackally's* case, 9 *Co. Rep.* 67. *b.*

2. That in this case all, that were present and assisting to the rioters, were guilty of the death of the party slain, tho they did not all actually strike him, or any of the constable's company.

3. That those within the house, if they abetted or counselled this riot, were in law present, aiding, and assisting, and principals as well as those that issued out and actually committed the assault, for it was but within five rod of the house, and in view thereof, and all done, as it were, in the same instant; *vide* lord *Dacre's* case before.

4. That here was sufficient notice, that it was the constable before the man was kild, 1. Because he was constable of the same vill. 2. Because he notified his business at the door before the assault, *viz.* that he came with the justice's warrant. 3. Because after his retreat, and before the man slain, the constable commanded the peace, and notwithstanding it the rioters fell on, and kild the party.

5. It was resolved, that the killing of the assistant of the constable was murder, as well as the killing of the constable himself.

6. That those, that came in the assistance of the constable, tho not specially called thereunto, are under the same protection as they that are called to his assistance by name.

7. That altho the constable retired with his company upon the not delivering up of *A.* yet the killing of the assistant of the
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the constable in that retreat was murder. 1. Because it was one continued act in the pursuance of his office, his retiring was as necessary, when he could not attain the effect of his warrant, and was in effect a continuation of the execution of his office, and under the same protection of the law, as his coming was. 2. Principally, because the constable in the beginning of the assault, and before the man was stricken, commanded the peace, and is all one with *Yonge's* case.

3. It seems, that tho the constable had not commanded the peace, yet when he and his company came about what the law allowd them, and, when they could not effect it fairly, were going their way, that the rioters pursuing them, and killing one, was murder in them all, because it was done without provocation, for they were peaceably retiring; but this point was not stood upon, because there was enough upon the former point to convict the offenders, and in the conclusion the jury found nine of them guilty, and acquitted those within, not because they were absent, but because there was no clear evidence, that they consented to the assault, as the jury thought, and thereupon judgment was given against the nine to be hanged: and note, that the award was for the marshal to do execution, because they were remanded to the custody of the marshal, and he is the immediate officer of the court, and precedents in cases of judgment given in the king's bench have commonly run, *Et dictum est marescallo, &c. quod faciat executionem periculo incumbente.* (r)

At *Newgate* in *Lent* vacation, 26 *Car.* 2. the case was thus: five persons committed a robbery about *Hounslow-heath* in *Middlesex*, viz. *Jackson* and four others, the party robbed raised hue and cry, the country pursued them, and at *Hamstead Jackson* one of the five turned upon his pursuers, the
 2 rest

(r) And thus it was in the case of the *Althoes*, T. 9 *Geo.* 1. *B. R.* who were convicted of a barbarous murder in *Pembrokeshire*, at *Hereford* assizes, being the next *Englsh* county; the indictment was removed by *Certiorari* into the king's bench, in order to argue some exceptions, which were over ruled; and after some question made, whether they ought

not to be sent back to *Herefordshire* to receive sentence there, the court was of opinion, that they had the same jurisdiction over facts committed in *Wales*, as if committed in the next adjacent county in *England*, and so they were sentenced at the king's bench, and were executed by the marshal at *Kennington* gallows near *Southwark*.

rest being in the same field, and having often resisted the pursuers, and refusing to yield kild one of the pursuers: by five judges then present it was ruled, 1. That this was murder, because the country upon hue and cry levied are authorized by law to pursue and apprehend the malefactors; and in this case here was a felony done, and a felony done by those persons, that were thus pursued. 2. That altho there was no warrant of a justice of peace to raise hue and cry, and tho there was no constable in the pursuit, yet the hue and cry was a good warrant in law for them to apprehend the offenders, and the killing of any of the pursuants by *Jackson* was murder. 3. In as much as all of the robbers were of a company, and made a common resistance, and so one animated the other, all those of the company of the robbers, that were in the same field, tho at a distance from *Jackson*, were all principals, viz. present, aiding, and abetting. 4. That when one of the malefactors was apprehended a little before the party was hurt, that person being in custody when the stroke was given was not guilty, unless it could be proved, that after he was apprehended he had animated *Jackson* to kill the party: they had all judgment of death for the robbery, and four of them for the murder.

A pres-master seized *B.* for a soldier, and with the assistance of *C.* laid hold on him, *D.* finding fault with the rudeness of *C.* there grew a quarrel between them, and *D.* kild *C.* By the advice of all the judges, except very few, it was ruled, that this was but manslaughter, 17 *Car.* 2. (*f*).

III. the third kind of *malice implied* is in relation to the person killing.

If *A.* come to rob *B.* in his house, or upon the highway; or otherwise without any precedent intention of killing him; yet if in the attempt, either without or upon the resistance of *B.* *A.* kills *B.* this is murder. *Co. P. C.* p. 52.

So if men come to steal deer in a park or forest, or to rob a warren of conies, and the parker, forester, or warrener resists and is kild, this is murder; the lord *Dacre's* case.

If a prisoner die by reason of dureſs and hard uſage by the gaoler, it is murder in the gaoler. *Co. P. C. p. 52.*

So if a ſheriff have a precept to hang a man for felony, and he beheads him, it is murder. *Co. P. C. ibidem.*

To theſe may be added the caſes abovementiond, *viz.* if *A.* by malice fore-thought ſtrikes at *B.* and miſſing him ſtrikes *C.* whereof he dies, tho he never bore any malice to *C.* yet it is murder, and the law transfers the malice to the party ſlain; the like of poiſoning, *ſed de his ſupra cap.*

C H A P. XXXVIII.

Of manſlaughter, and particularly of manſlaughter exempt from clergy, by the ſtatute of 1 Jac. 8.

MAnſlaughter, or ſimple homicide, is the voluntary killing of another without malice expreſs or implied, and differs not in ſubſtance of the fact from murder, but only differs in theſe enſuing circumſtances.

1. In the degree of the offence, murder being aggravated with malice preſumed or implied, but manſlaughter not, and therefore in manſlaughter there can be no accessories before.
2. In the form of the indictment, the former being always *felonicè ex malitiâ præcogitatâ interfecit & murdravit*, the latter only *felonicè interfecit*.
3. In the point of clergy, murder being by the ſtatute of 23 *H. 8. cap. 1.* exempt from the benefit of clergy, but not manſlaughter.
4. In the form of the pardon of murder, for tho at common law a pardon of all felonies had pardoned murder; yet by the ſtatute of 13 *R. 2. cap. 1.* the pardon of murder muſt either be by the expreſs word of *murder*, or elſe it muſt be a pardon of *felonica interfectio*

interfectio with a special *non obstante* of the statutes of 13 R. 2. H. 1 Jac. Lucas's case. (a)

But the pardon of manslaughter may be general by the words of *felonia* or *felonica interfectio*, and hence it is, that if a man indicted of murder obtains a pardon of felony, or *felonica interfectio* only, and be afterwards arraigned upon an indictment of murder, he must plead *quoad murdrum & interfectionem ex malitiâ præcogitatâ* not guilty, and as to the felony and interfection must plead his pardon; and then if the jury being charged to inquire of the plea of *not guilty*, find it to be only a simple felony and interfection without malice forethought, his pardon is to be allowd; and thus upon good deliberation it was done in the year 1668. at *Norwich*, Sir *Thomas Potté's* case, and is pursuant to the statute of 13 R. 2. which saith, "That before a pardon of felonies shall be allowed as to murder, it shall be inquired by good inquiry, if he were slain by await or malice prepensed." And I remember very well in the case of *Rutaby*, T. 1653. who was indicted of murder in *Durham*, the defendant pleaded a pardon of *felonica interfectio*, and a general *non obstante* of all statutes; and the attorney general demurred: it was ruled, 1. That the pardon was insufficient with only a general *non obstante*, unless murder had been contained in the body of the pardon by express words. 2. But tho the pardon was disallowd as to murder, yet the prisoner was remitted into *Durham* to be tried, whether guilty of murder, and being so found was executed; but had it been found only manslaughter, he should have been discharged, and altho his plea of the pardon to the indictment of murder was disallowd, yet it had stood good, if the conviction were of manslaughter: by the statute of 1 Jac. cap. 8. "Any person that shall stab or thrust any person, that hath not any weapon drawn, or hath not first stricken the party, that shall so stab or thrust, if the party die within six months, the offender is ousted of clergy, provided it shall not extend to him, that kills *se defendendo*, or by misfortune, or in preserving the peace, or chastizing his child or servant.

This

(a) *Moor*, n. 1033. p. 7524

This act, tho but temporary, is continued till some other act of parliament shall be made touching the continuance or discontinuance thereof. 17 *Car. I. cap. 4.*

The use hath been in cases of this nature to prefer two indictments against offenders in this kind, *viz.* one of murder, another upon this statute, and put the prisoner to plead to both, and to charge the jury first with the indictment of murder, and if they find it not to be murder, then to charge them to inquire upon the other bill, because, if convicted upon either, the offender is ousted of clergy.

The indictment to put the prisoner from his clergy must be specially formed pursuant to the statute, *viz.* that he did with a sword, &c. stab the party dead, he having no weapon drawn, nor having struck first, otherwise it will be but a common manslaughter, and the party will have his clergy.

The indictment need not conclude *contra formam statuti*, no more than in burglary or robbery, for the statute doth not make the offense to be felony, but ousts the prisoner of his clergy, where the crime is so circumstantiated as the statute expresseth; this was agreed in the case of *Page and Harwood*, *H. 23 Car. 1. B. R. (b)*

But yet it doth not vitiate the indictment, tho it do conclude, *Et sic interfecit contra formam statuti*, as was adjudged *Trin. 9 Jac. B. R. Bradley and Banks (c)*; and accordingly for the most part to this day the indictments upon this statute do conclude *contra formam statuti*, so it is good with or without such conclusion, but it is best to follow the common usage, because every man doth not readily observe the reason of the omission of that conclusion.

In the case of *Page and Harwood*, *H. 23 Car. 1.* before cited, these points were resolved in the king's bench, *viz.*

1. That no man is ousted of his clergy by this statute, but he that actually stabs, and therefore those, that are laid in the indictment to be present, aiding, and abetting in such a case, shall be admitted to the benefit of clergy; and therefore, tho

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(b) In this case, as reported in *Styles* 86. it is not agreed to be so, on the contrary it was denied *per Roll*, and doubted *per Bacon.*

(c) *Cro. Jac.* 283.

the indictment of such a manslaughter be specially formed upon the statute, and conclude *contra formam statuti*, yet it is a good indictment of manslaughter against them, that were present, aiding, and abetting, and therefore upon such a special indictment of manslaughter upon the statute, the prisoner may be convict of simple manslaughter, and acquitted of manslaughter upon the statute, and the indictment serves for a common manslaughter, as well as a man upon an indictment of murder may be acquit of murder, and convict of manslaughter.

22 Martii, 14 Car. 1. At Newgate sessions David Williams was indicted specially upon this statute for the death of Francis Marbury (d), viz. *Quod felonice &c. unum malleum de ferro & ligno, anglice an hammer of wood and iron è manu suâ dextrâ erga & ad anteriorem partem capitis ipsius Francisci felonice violenter & in furore suo projecit, & cum malleo prædicto ipsum Franciscum in & super anteriorem partem capitis &c. percussit & pupugit, anglice did stab and thrust the said Marbury having no weapon drawn, nor struck first, whereof he presently died, & sic modo & formâ prædictâ interfecit &c. contra formam statuti &c.* The prisoner pleaded not guilty, and a special verdict was found, viz. that upon St. David's day the prisoner being a *Welshman* had a leek in his hat, and that there was at the same time in waggery a *Jack-a-lent* in the street put up with a leek, and one *Nicholas Redman*, a porter, spake to the prisoner, and pointing to the *Jack-a-lent* said, *Look at your countryman*, and the prisoner being therewith enraged, threw an hammer at *Redman* to the intent feloniously to hit him, but missing him, the hammer did hit *Francis Marbury*, whereof he died, & sic prædictus David præfatum Franciscum cum malleo prædicto pupugit & percussit, anglice did stab and thrust, the said *Francis* then not having any weapon drawn, nor then having first stricken the said *David*; and it was judged by *Bramston*, *Jones*, and the recorder *Gardiner*, that *Williams* was guilty of manslaughter at the common law, *sed non contra formam statuti*, so that it seems they thought not this to be a stabbing within the statute, being done with the throwing of

the hammer, or at least they took this killing of *Marbury*, which was not at all intended by *Williams*, to be out of the statute, tho it excused him not for manslaughter at common-law. (e)

The words of the statute are *stab or thrust*, if the stabbing or thrusting were with a sword, or with a pikestaff, it is within the statute, so it seems, if it be a shot with a pistol, or a blow with a sword or staff, yet *quere*, for *Jones* justice denied it.

In *M. 5 Jac.* it was ruled, that if the party slain had a cudgel in his hand, it is a weapon drawn within this statute, and the prisoner was admitted to his clergy at *Newgate*; but it seems it must be intended of such a cudgel, as might probably do hurt, not a small riding-rod or cane.

In the year 1657. (f) at *Newgate* before *Glynn*, who then sat as chief justice, a man was indicted upon this statute, and a special verdict found, that a bailiff having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, nor the man knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword, that hanged in his chamber, and stabbed the bailiff, whereof he presently died: there was some diversity of opinion among the judges, whether this were within the statute, but at length the prisoner was admitted to his clergy, for tho this case was within the words of the statute, and not within the particular exceptions, yet it was held, that this case was never intended in the statute, for the prisoner did not know, but that the party came in to rob or kill him, when he thus violently brake into his chamber without declaring his business. (g)

(e) Lord chief justice *Holt* in *Maregridge's* case, *Kel.* 131. concurs with this judgment, for that it was not such a weapon or act, as is within the statute of stabbing, but he is of opinion, that *Williams* ought to have been found guilty of murder, if the indictment had been so laid, for that there was not a sufficient provocation to lessen the offense to manslaughter.

(f) *Quere*, whether the case here meant be not *Buckner's* case, *M.* 1655. reported in *Styles* 467. but that, as it is there reported, was not the case of a bailiff, but of a creditor, who stood at the door with a sword undrawn to keep the debtor in, till they could send for a bailiff, and was kild by the debtor.

(g) See *Kel.* 136.

C H A P. XXXIX.

*Touching involuntary homicide, and first
of chance-medley or killing per infor-
tunium.*

INvoluntary homicide is the death or hurt of the person of a man against or besides the will of him that kills him.

And in these cases, to speak once for all, the indictment itself must find the special matter, or in case the indictment be of murder or manslaughter, and upon the trial it appears to the jury it was involuntary, (as by misfortune, or in his own defense) the jury ought to find the special matter, and so conclude, *Et sic per infortunium*, or *se defendendo*, and not generally, that it was *per infortunium*, or *se defendendo*, because the court must judge upon the special matter, whether it be murder, homicide, or *per infortunium*, or *se defendendo*, and the jury is only to find the fact, and leave the judgment thereupon to the court; and in such case the prisoner must not plead the special matter, and so justify, but must plead not guilty, and the special matter must be found by the jury, *Stamf. P. C. Lib. I. cap. 7. fol. 15. a. Lib. III. cap. 9. fol. 165. a.* for upon the special matter found the court may give judgment against the conclusion of the verdict, as that the fact is manslaughter, tho the conclusion of the verdict be *per infortunium*, or *se defendendo*. 44 E. 3. Coron. 94.

This involuntary homicide is of two kinds, *viz.* either 1. When it is purely involuntary and casual, as the killing of a man *per infortunium*, or 2. When it is partly involuntary, and partly voluntary, but occasioned by a necessity, that the law allows, which is commonly called homicide *ex necessitate*, as killing a man in his own defense, or the like; *de quibus postea.*

Homicide *per infortunium* is, where a man is doing a lawful act, and without intention of bodily harm to any person, and by that act death of another ensues, as if a man be shooting at butts or pricks, and by casualty his hand shakes, and the arrow kills a by-stander. 21 H. 7. 28. a. 6 E. 4. 7. b.

Or if a carpenter or mason in building casually let fall a piece of timber or stone, and kills another. 21 H. 7. B. Coron. 59.

But if he voluntarily let it fall, whereby it kills another, if he give not due warning to those that are under, it will be at least manslaughter; *quia debitam diligentiam non adhibuit.*

So if a man be felling a tree in his own ground, and it fall and kill a person, it is chance-medley. 6 E. 4. 7.

But in all these cases, if it doth only hurt a man by such an accident, it is nevertheless a trespass, and the person hurt shall recover his damages, for tho the chance excuse from felony, yet it excuseth not from trespass. 6 E. 4. 7.

Regularly he that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least, as if *A.* intends to beat *B.* but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen.

And therefore I have known it ruled, that if two men are playing at cudgels together, or wrestling by consent, if one with a blow or fall kill the other, it is manslaughter, and not *per infortunium*, tho Mr. Dalton, cap. 96. (a) seems to doubt it; and accordingly it was resolved P. 2 Car. 2. by all the judges upon a special verdict from *Newgate*, where two friends were playing at foils at a fencing school, one casually kild the other; resolved to be manslaughter.

Sir *John Chichester*, and his man-servant, whom he very well loved, were playing together, the man had a bedstaff in his hand, and Sir *John* had his rapier in the scabbard, Sir *John*, according to the usual sport between them, bids his man guard his thrust or pass, which he was making at him

with his rapier in the scabbard; the servant with the bedstaff brake the thrust, but withal struck off the chape of the scabbard, whereby the end of the rapier came out of the scabbard; but the thrust was not so effectually broken, but the end of the rapier prickt the servant in the groin, whereof he died: Sir *John Chichester* was for this indicted of murder, and tried at the king's bench bar, where all this evidence was given; and it was ruled, 1. That it was not murder, tho the act itself was not lawful, because there was no malice or ill will between them. 2. That it was not barely chance-medley, or *per infortunium*, because altho the act, which occasioned the death, intended no harm, nor could it have done harm, if the chape had not been stricken off by the party kild; and tho the parties were in sport, yet the act itself, the thrusting at his servant, was unlawful, and consequently the death, that ensued thereupon, was manslaughter; and was accordingly found and adjudged, which I heard 23 *Car. 1. (b)*, 11 *H. 7. 23. a. Kelm. 108, 136.*

But if two play at barriers, or run a-tilt without the king's commandment; and one kill the other; it is manslaughter; but if it be by the king's command, it is not felony, or at most *per infortunium*. 11 *H. 7. 23. B. Coron. 229. Dalton, cap. 96. Co. P. C. p. 56. (c)*

If *A.* come into the wood of *B.* and pull his hedges; or cut his wood, and *B.* beat him, whereof he dies, this is manslaughter, because, tho it was not lawful for *A.* to cut the wood; it was not lawful for *B.* to beat him, but either to bring him to a justice of peace; or punish him otherwise according to law.

But if a school-master correct his scholar, or a master his servant, or a parent his child; and by strugling, or otherwise;

6 E

the

(b) *Alcyn 12.* This seems a very hard case, and indeed the foundation of it fails, for the pushing with a sword in the scabbard by consent seems not to be an unlawful act, for it is not a dangerous weapon likely to occasion death, nor did it do so in this case but by an unforeseen accident, and therein differs from the case of justing, (or prize-fighting) where-

in such weapons are made use of, as are fitted, and likely to give mortal wounds.

(c) *Brécke*, after having taken notice of this as *Fineux's* opinion, says, That other justices in the time of *Henry VIII.* denied this, and held it felony to kill a man in justing, or sporting after that manner, notwithstanding the king's command, *for such command is against law.*

the child or scholar, or servant die, this is only *per infortunium*. *Crompt. Just.* 28. b.

But this is to be understood, when it happens only upon moderate correction, for if the correction be with an unfit instrument (*d*), or too outrageous, then it is murder, as it happend in a case at *Normich* assizes 1670. where the master struck a child, that was his apprentice, with a great staff, of which it died, it was ruled murder.

Several persons come to enter the house of *A.* as trespassers, *A.* shoots and kills one, this is manslaughter, otherwise it had been, if they had entred to commit a felony. *Crompt. de Pace, fol. 29. a. Harcourt's case.*

But in the case of *Levet* indicted for the death of *Frances Freeman*, the case was, That *William Levet* being in bed and asleep in the night in his house, his servant hired *Frances Freeman* to help her to do her work, and about twelve of the clock in the night the servant going to let out *Frances* thought she heard thieves breaking open the door, she therefore ran up speedily to her master, and informed him, that she thought thieves were breaking open the door, the master rising suddenly, and taking a rapier ran down suddenly, *Frances* hid herself in the buttery lest she should be discoverd, *Levet's* wife spying *Frances* in the buttery, and not knowing her cried out, *Here they be that would undo us*, *Levet* runs into the buttery in the dark, not knowing *Frances*, but thinking her to be a thief, and thrusting with his rapier before him hit *Frances* in the breast mortally, whereof she instantly died: this was resolved to be neither murder, nor manslaughter, nor felony: *vide* the case cited by justice *Jones, P. 15 Car. 1. B. R. and Croke, n. 1.* (in *Cook's* case (*e*) for killing a bailiff, that broke a window to execute a *Capias*, which was judged to be manslaughter;) where the book says it was not felony, *quære* whether it be not homicide by misadventure, for the party kild was in truth no thief, tho mistaken for one, and tho it be not homicide voluntary, yet it seems to be *per infortunium*.

I

If

(*d*) As with a bar of iron, or a sword, or a great cudgel, *Kel. 64, 133.*

(*e*) *Cro. Car. 538. W. Jones 429.*

If a man knowing that people are passing along the street throws a stone, or shoots an arrow over the house or wall with intent to do hurt to people, and one is thereby slain, this is murder, and if it were without such intent, yet it is manslaughter, and not barely *per infortunium*, because the act itself was unlawful; but if the man were tiling an house, and let fall a tile knowingly, and gave warning, and yet a person is kild, this is *per infortunium*, but if he gave not convenient warning, it is manslaughter, *quia non adhibuit debitam diligentiam.* (f)

If *A.* in his own park shoot at a deer, and the arrow glancing against a tree hits and kills *B.* this is homicide *per infortunium*, because it was lawful for him to shoot in his own park.

But if *A.* without the licence of *B.* hunt in the park of *B.* and his arrow glancing from a tree killeth a by-stander, to whom he intended no hurt, this is manslaughter, because the act was unlawful.

So if *A.* throw a stone at a bird, and the stone striketh and killeth another, to whom he intended no harm, it is *per infortunium*.

But if he had thrown a stone to kill the poultry or cattle of *B.* and the stone hit and kill a by-stander, it is manslaughter, because the act was unlawful, but not murder, because he did it not maliciously, or with an intent to hurt the by-stander.

By the statute of 33 *H. 8. cap. 6.* "No person not having lands, &c. of the yearly value of one hundred pounds *per annum* may keep or shoot in a gun upon pain of forfeiture of ten pounds." Suppose therefore such a person not qualified shoots with a gun at a bird, or at crows, and by mischance it kills a by-stander by the breaking of the gun, or some other accident, that in another case would have amounted only to chance-medley, this will be no more than chance-medley in him, for tho the statute prohibit him to
keep

(f) This is upon supposition, that the house do not stand near an highway or place of resort, for then, tho he should cry out first, it is manslaughter. See *Hull's case* 1664. *Kel.* 40.

keep or use a gun, yet the same was but *malum prohibitum*; and that only under a penalty, and will not inhanse the effect beyond its nature.

A. having deer frequenting his corn-field out of the precinct of any forest or chace sets himself in the night-time to watch in a hedge, and sets *B.* his servant to watch in another corner of the field with a gun charged with bullets, giving him order to shoot, when he hears any bustle in the corn by the deer, the master himself improvidently rushes into the corn, the servant supposing it to be the deer shoots, and thereby kills his master in the night, this is neither petit treason, murder, nor manslaughter, but chance-medley, for the servant was misguided by his master's own direction, and was ignorant, that it was any thing else but the deer. This was my opinion in a case happening at *Peterborough* session; but it seemed to me, that if the master had not given such direction, that was the occasion of his mistake, it would have been manslaughter to have shot at a man, tho by mistaking it for the deer, because he did not *adhibere debitam diligentiam* to discover his mark, but shot directly at the person of a man, tho mistaking it for a deer.

A. drives his cart carelessly, and it runs over a child in the street, if *A.* have seen the child, and yet drives on upon him, it is murder; but if he saw not the child, yet it is manslaughter; but if the child had run cross the way, and the cart run over the child before it was possible for the carter to make a stop, it is *per infortunium*, and accordingly this direction was given by us at *Newgate* sessions in 1672. and the carter convict of manslaughter.

If a man or boy riding in the street whip his horse to put him into speed, and run over a child and kill him, this is homicide, and not *per infortunium*, and if he rid so in a press of people with intent to do hurt, and the horse had kild another, it had been murder in the rider.

But if a man or boy be riding in the street, and a by-stander whip the horse, whereby he runs away against the will of the rider, and in his course runs over and kills a child or man, it is chance-medley only, and in that case the jury ought

ought not to find him *not guilty* generally, but the special matter; but yet, because the coroner's inquest, which stood untraversed, had found the special matter, the court received the verdict of *not guilty* upon the indictment by the grand inquest of murder, and the party confessed the indictment by the coroner, and had his pardon of course, and this was said by *Lee* secondary to be the course at *Newgate*, 1 Sept. 16. Car. 2. *Richard Pretty's* case.

Tho the killing of another *per infortunium* be not in truth felony, nor subjects the party to a capital punishment, and therefore usually in such cases the verdict concludes, *quod interfecit per infortunium, & non per feloniam*, yet the party forfeits his goods, and tho he ought to have *quasi de jure* a pardon of course upon the certificate of the conviction, yet he is not to be discharged out of prison, but bailed till the next term or sessions to sue out his pardon of course, for tho it was not his crime, but his misfortune, yet because the king hath lost his subject, and that men may be the more careful, he forfeits his goods, and is not presently absolutely discharged of his imprisonment, but bailed, *ut supra*.

And so strict was the judicial law of the *Jews* in relation to the life of man, that even in this case the avenger of blood might kill the manslayer *per infortunium* before he got to the city of refuge, *Deut. xix. 5, 6*.

C H A P. XL.

Of manslaughter ex necessitate, and first se defendendo.

I Come to those homicides, that are *ex necessitate*, and this necessity makes the homicide not simply voluntary, but mixed, partly voluntary and partly involuntary, and is of two kinds.

1. That necessity, which is of a private nature.
2. That necessity, which relates to the public justice and safety.

The former is that necessity, which obligeth a man to his own defense and safeguard, and this takes in these inquiries,

1. What may be done for the safeguard of a man's own life.
2. What may be done for the safeguard of the life of another.
3. What may be done for the safeguard of a man's goods.
4. What may be done for the safeguard of a man's house of habitation.

I. As touching the first of these, *viz.* homicide in defense of a man's own life, which is usually styled *se defendendo*.

It is generally to be observed, that in case of any indictment or charge of felony the prisoner cannot plead any thing by way of justification, as that he did it in his own defense, or *per infortunium*, but must plead *not guilty*; and upon his trial the special matter is to be found by the jury, and thereupon the court gives judgment.

Homicide *se defendendo* is of two kinds.

1. Such, as tho it excuse from death, yet it excuseth not the forfeiture of goods, nor is the party to be absolutely discharged out of prison, but bailed, and to purchase his pardon of course.

2. Such as wholly acquits from all kinds of forfeiture.

First therefore of common homicide *se defendendo*.

Homicide *se defendendo* is the killing of another person in the necessary defense of himself against him, that assaults him.

In this case of homicide *se defendendo* there are these circumstances observable.

1. It is not necessary, that the party kild be the first aggressor or assailant, or of his party, tho commonly it holds.

There is malice between *A.* and *B.* they appoint a time and place to fight, and meet accordingly, *A.* gives the first onset, *B.* retreats as far as he can with safety, and then kills *A.* who had otherwise kild him; this is murder, for they met by compact and design, and therefore neither shall have the advantage of what they themselves each of them created.

There is malice between *A.* and *B.* they meet casually, *A.* assaults *B.* and drives him to the wall, *B.* in his own defense kills *A.* this is *se defendendo*, and shall not be heightend by the former malice into murder or homicide at large, *Copston's* case cited *Crompt. de Pace* 27. *b.* and *Dalt. cap.* 98. (*a*), for it was not a killing upon the account of the former malice, but upon a necessity imposed upon him by the assault of *A.*

A. assaults *B.* and *B.* presently thereupon strikes *A.* without flight, whereof *A.* dies, this is manslaughter in *B.* and not *se defendendo*, 43 *Affiz.* 31. but if *B.* strikes *A.* again, but not mortally, and blows pass between them, and at length *B.* retires to the wall, and being pressed upon by *A.* gives him a mortal wound, whereof *A.* dies, this is only homicide *se defendendo*, altho that *B.* had given divers other strokes, that were not mortal before he retired to the wall, or as far as he could. *Stamf. P. C. Lib. I. cap.* 7. *fol.* 15. *a.* *Dalt. cap.* 98. *Crompt.* 28. *a.*

But now suppose, that *A.* by malice makes a sudden assault upon *B.* who strikes again, and pursuing hard upon *A.* *A.* retreats to the wall, and in saving his own life kills *B.* some have held this to be murder, and not *se defendendo*, because *A.* gave the first assault, *Crompt. fol.* 22. *b.* grounding upon the book of 3 *E.* 3. *Itin. North. Coron.* 287. but

Mr. Dal-

(a) *New Edit. cap.* 150. *p.* 484.

Mr. Dalton, *ubi supra*, thinketh it to be *se defendendo* (b), tho A. made the first assault, either with or without malice, and then retreated; therefore the book of 3 E. 3. Coron. 284, 287. which occasioned the doubt, is to be examined, which is thus.

It seems to me, that if A. did retreat to the wall upon a real intent to save his life, and then merely in his own defense kild B. that it is *se defendendo*, and with this agrees *Stamf. P. C. Lib. I. cap. 7. fol. 15. a.* But if on the other side A. knowing his advantage of strength, or skill, or weapon, retreated to the wall merely as a design to protect himself under the shelter of the law, as in his own defense, but really intended the killing of B. then it is murder, or manslaughter, as the circumstance of the case requires, and that was the reason, why the judges demanded of the jury 3 E. 3. whether he kild B. of malice, or otherwise to save himself, and when the jury answered, *It was to save his life*, he was remitted to prison to have his pardon of course. 3 E. 3. Coron. 284, 287.

2. In homicide *se defendendo* there seems necessary some act to be done by the party killing, for if he be merely passive, this will make it only a killing *per infortunium*.

A. assaults B. who flies to the wall, or falls, holding his sword, knife or pike in his hand, A. runs violently, or falls upon the knife of B. without any thrust or stroke offered at him by B. and thereupon dies, this is death *per infortunium*,
and

(b) The case here referred to in Dalton is the case of an affray, (which is likewise the case put by Stamford) of this he says there was a difference of opinions, but delivers no opinion of his own, but as to the case here put by our author of a malicious assault, which he afterwards mentions, he seems plainly to be of the contrary opinion, and to think it murder; nor do I see any thing in Coron. 284, 287. that could occasion any doubt about this matter, or any way relates to this case, for both those cases (which seem to be but one and the same) were of an affray, in which he, that struck first, was the party kild, and the party killing struck not at all, till after he had fled as far as he could, and was necessitated to do it in his own defense;

so that the reason assigned by our author for demanding the question of the jury is grounded on a mistake; that, which to me seems the reason of putting that question to the jury, is this, the jury had found the fact specially, but had not drawn any general conclusion from it, the question was therefore asked, that they might make the usual conclusion, *unde dicunt, quod prædictus A.* (the defendant) *se defendendo prædictum B.* (the deceased) *interfecit, & non per feloniam aut malitiam præcogitatum*, which was done accordingly; and therefore in the first of those places, *viz. Coron. 284.* the usual conclusion being inserted, no notice is taken of the question put to the jury.

and some have said, that in this case *A.* is *felo de se, de quo antea, vide Stamf. P. C. Lib. I. cap. 7. p. 16. & libros ibi.*

3. Regularly it is necessary, that the person, that kills another in his own defense, fly as far as he may to avoid the violence of the assault before he turn upon his assailant, for tho in cases of hostility between two nations it is a reproach and piece of cowardice to fly from an enemy, yet in cases of assaults and affrays between subjects under the same law, the law owns not any such point of honour, because the king and his laws are to be the *vindices injuriarum*, and private persons are not trusted to take capital revenge one of another.

But this hath some exceptions.

1. In respect of the person killing.

If a gaoler be assaulted by his prisoner, or if the sheriff or his minister be assaulted in the execution of his office, he is not bound to give back to the wall, but if he kill the assailant, it is in law adjudged *se defendendo*, tho he give not back to the wall; the like of a constable or watchman, for they are ministers of justice, and under a more special protection in the execution of their office, than private persons. *Co. P. C. p. 56. 9 Co. Rep. 68. b. Mackally's case.*

But if the prisoner makes no resistance, but flies, yet the officer, either for fear, that he or some other of his party will rescue the prisoner, strikes the prisoner, whereof he dies, this is murder, for here was no assault first made by the prisoner, and so it cannot be *se defendendo* in the officer.

And here is the difference between civil actions and felonies.

If a man be in danger of arrest by a *Capias* in debt or trespass, and he flies, and the bailiff kills him, it is murder, but if a felon fly, and he cannot be otherwise taken, if he be kild, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and kild forfeits his goods.

2. In relation to the person kild.

If a thief assault a true man either abroad or in his house to rob or kill him, the true man is not bound to give back, but may kill the assailant, and it is not felony. *Co. P. C. p. 56.*

3. In respect of the manner of the assault.

If *A.* assault *B.* so fiercely, that *B.* cannot save his life if he give back, or if in the assault *B.* fall to the ground, whereby he cannot fly, in such case if *B.* kills *A.* it is *se defendendo*, *Co. P. C. p. 56.* but now here will be occasion to resume the former debate, where the first assailer may be said to kill the assailed *se defendendo*.

If *A.* assault *B.* and *B.* thereupon reassault *A.* and *A.* really flies to avoid the assault of *B.* who pursues him, and then *A.* being driven to the wall turns again and kills *B.* it seems this may be *se defendendo*, as hath been said, for it appears *de facto*, that *A.* fled from the assault of *B.* till he could fly no farther.

But if *A.* assaults *B.* first, and upon that assault *B.* reassaults *A.* and that so fiercely, that *A.* cannot retreat to the wall or other *non ultra* without danger of his life, nay, tho *A.* fall upon the ground upon the assault of *B.* and then kills *B.* this shall not be interpreted to be *se defendendo* (*c*), but to be murder, or simple homicide, according to the circumstances of the case, for otherwise we should have all cases of murders or manslaughters by way of interpretation turned into *se defendendo*.

The party assaulted indeed shall by the favourable interpretation of the law have the advantage of this necessity to be interpreted as a flight (*d*) to give him the advantage of *se defendendo*, when the necessity put upon him by the assailant makes his flight impossible; but he, that first assaulted, hath done the first wrong, and brought upon himself this necessity, and shall not have advantage of his own wrong to gain the favourable interpretation of the law, that that necessity, which he brought upon himself, should by way of interpretation be accounted a flight to save himself from the guilt of murder or manslaughter.

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(*c*) Because his fall not being voluntary, as a flight is, it does not appear, that he declined fighting, so that the party first assaulted cannot safely quit the advantage he has got.

(*d*) Not that the law esteems this necessity to be a flight, but the party not having opportunity of flying, the law does not require it of him; but excuses him in the same manner, as if he had fled.

If *A.* after the assault had really and *bonâ fide* fled from *B.* or that they had been parted by by-standers, that had given a kind of interruption to the affray, and a declining of any farther affray by *B.* and therefore when *B.* pursues him to kill him, and *A.* after his flight, upon necessity of saving his life, kills *B.* this is apparent to be *se defendendo*, but when it is done altogether without any interval of flight or parting, and *B.* that was first assaulted, gains the present advantage by his strength, courage or fortune, to preclude the flight of *A.* and then *A.* kills him, this seems to be manslaughter, and not *se defendendo*.

And it must be observed, that the flight to gain the advantage of *se defendendo* to the party killing must not be a feigned flight, or a flight to gain advantage of breath, or opportunity to fall on afresh, as fighting cocks retire to gain advantage, but it must be a flight from the danger, as far as the party can, either by reason of some wall, ditch, company, or as the fierceness of the assailant will permit.

In *Fleet-street* *A.* and *B.* were walking together, *B.* gave some provoking language to *A.* who thereupon gave *B.* a box on the ear, they closed, *B.* was thrown down, and his arm broken, he runs to his brother's house presently, which was hard by, *C.* his brother taking the alarm came out with his sword drawn, and made towards *A.* who retreated ten or twelve yards, *C.* pursued him, *A.* drew his sword and made a pass at *C.* and kild him, *A.* being indicted at *Newgate* sessions for murder, the court directed the jury upon the trial to find this manslaughter, not murder, because upon a sudden falling out; not *se defendendo*, partly because *A.* made the first breach of the peace by striking *B.* and partly because, unless he had fled as far as might be, it could not by way of interpretation be said to be in his own defense; and it appeared plainly upon the evidence, that he might have retreated out of danger, and his stepping back was rather to have an opportunity to draw his sword, and with more advantage to come upon *C.* than to avoid him; and accordingly at last it was found manslaughter 1671. at *Newgate*.

II. I come to the second consideration, namely what the offense is, if a man kill another in the necessary saving of the life of a man assaulted by the party slain.

A. assaults the master, who flies as far as he can to avoid death, the servant kills *A.* in defense of his master; this is homicide *defendendo* of the master, and the servant shall have a pardon of course, 21 *H.* 7. 39. *a.* but if the master had not been driven to that extremity, it had been manslaughter at large in the servant, if he had no precedent malice in him. *Plowd. Com.* 100.

The like law had been for a master killing in the necessary defense of his servant, the husband in the defense of the wife, the wife of the husband, the child of the parent, or the parent of the child, for the act of the assistant shall have the same construction in such cases, as the act of the party assisted should have had, if it had been done by himself, for they are in a mutual relation one to another.

If *A.* and *B.* and *C.* be of a company together, and walking in the field *C.* assaults *B.* who flies, *C.* pursues him, and is in danger to kill him, unless present help, *A.* thereupon kills *C.* in defense of the life of *B.* it seems that in this case of such an inevitable danger of the life of *B.* this occision of *C.* by *A.* is in nature of *se defendendo*; but then it must appear plainly by the circumstances of the case, as the manner of the assault, the weapon, with which *C.* made the assault, &c. that the imminent danger of the life of *B.* be apparent and evident.

And the reason seems to be, because every man is bound to use all possible lawful means to prevent a felony, as well as to take the felon, and if he doth not, he is liable to a fine and imprisonment, therefore if *B.* and *C.* be at strife, *A.* a bystander is to use all lawful means, that he may without hazard of himself, to part them, and the very relation of acquaintance, and mutual society between *A.* *B.* and *C.* seems to excuse the fact of *A.* in the necessary safeguard of the life of *B.* from the crime of simple homicide; *tamen quere.*

If *A.* be travelling, and *B.* comes to rob him, if *C.* falls into the company, he may kill *B.* in defense of *A.* and therefore much more, if he come to kill him, and such his intent be

be apparent, for in such case of a felony attempted; as well as of a felony committed, every man is thus far an officer, that at least his killing of the attempter in case of necessity puts him in the condition of *se defendendo* in defending his neighbour; but of this more hereafter.

A. makes an assault upon *B.* a woman or maid with intent to ravish her, she kills him in the attempt, it is *se defendendo*, because he intended to commit a felony. *Dalt. cap. 98. p. 250.*

And so it is if *C.* the husband or father of *B.* had kild him in the attempt, if it could not be otherwise prevented, but if it might be otherwise prevented, it is manslaughter, therefore circumstances must guide in that case.

III. I come to consider, what the offense is in killing him, that takes the goods, or doth injury to the house or possession of another.

And herein there will be many diversities, as first between a trespassable act and a felonious act, and between felonious acts themselves.

If *A.* pretending a title to the goods of *B.* take them away from *B.* as a trespasser, *B.* may justify the beating of *A.* but if he beat him so that he die, it is neither justifiable, nor within the privilege of *se defendendo*, but it is manslaughter. *Dalt. cap. 98. p. 251.*

A. is in possession of the house of *B.* *B.* endeavours to enter upon him, *A.* can neither justify the assault nor beating of *B.* for *B.* had the right of entry into the house, but if *A.* be in possession of a house, and *B.* as a trespasser enters without title upon him, *A.* may not beat him, but may gently lay his hands upon him to put him out, and if *B.* resist and assault *A.* then *A.* may justify the beating of him, as of his own assault.

But if *A.* kill him in defense of his house, it is neither justifiable, nor within the privilege of *se defendendo*, for he entred only as a trespasser, and therefore it is at least common manslaughter: this was *Harcourt's* case, *Crompt. 27. a.* who being in possession of a house by title, as it seems, *A.* endeavoured to enter, and shot an arrow at them within the

house, and *Harcourt* from within shot an arrow at those, that would have entred, and kild one of the company, this was ruled manslaughter 5 *Eliz.* and it was not *se defendendo*, because there was no danger of his life from them without.

But if *A.* had entred into the house, and *Harcourt* had gently laid his hands upon him to turn him out, and then *A.* had turned upon him, and assaulted him, and *Harcourt* had kild him, it had been *se defendendo*, and so it had been if *A.* had entred upon him, and assaulted him first, tho he intended not to kill him, yet if *Harcourt* had thereupon kild *A.* it had been only *se defendendo*, and not manslaughter, tho the entry of *A.* was not with intent to murder him, but only as a trespasser to gain the possession, 3 *E. 3. Coron. 305. Cromp. 27. b.* and it seems to me in such a case *Harcourt* being in his own house need not fly, as far as he can, as in other cases of *se defendendo*, for he hath the protection of his house to excuse him from flying, for that would be to give up the possession of his house to his adversary by his flight.

A. commits adultery with *B.* the wife of *C.* who comes up and takes them in the very act, and with a staff kills the adulterer upon the place, this is manslaughter, and neither murder, nor under the privilege of *se defendendo*: but if *A.* had been taken by *C.* in the very attempt of a rape upon the wife, and she crying out, her husband had come and kild *A.* in the act of his ravishment, it had been within the privilege of *se defendendo*, because it was a felony; the former case was adjudged manslaughter by the court, *B. R. M. 23. Car. 2. (d)*

Now concerning felonies, as there is a difference between them and trespasses, so there is a difference among themselves in relation to the point of *se defendendo*.

If a man come to take my goods as a trespasser, I may justify the beating of him in defense of my goods, as hath been said, but if I kill him, it is manslaughter.

But if a man come to rob me, or take my goods as a felon, and in my resistance of his attempt I kill him, it is *me defendendo* at least, and in some cases not so much.

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(d) *Manning's case, Raym. 212.*

When he was to be burnt in the hand, the court directed it to be done

gently, because they said there could not be a greater provocation.

At common law, if a thief had assaulted a man to rob him, and he had kild the thief in the assault, it had been *se defendendo*, but yet he had forfeited his goods, as some have thought, 11 *Co. Rep.* 82. *b.* tho other books be to the contrary. 26 *Affiz.* 32.

But if *A.* had attempted a burglary upon the house of *B.* to the intent to steal, or to kill him, or had attempted to burn the house of *B.* if *B.* or any of his servants, or any within his house had shot and kild *A.* this had not been so much as felony, nor had he forfeited ought for it, for his house is his castle of defense, and therefore he may justify assembling of persons for the safeguard of his house. 21 *H.* 7. 39. *a.* 11 *Co. Rep.* 82. *b.* 5 *Co. Rep.* 91. *b.* 26 *Affiz.* 23. 3 *E.* 3. *Coron.* 330.

But otherwise it is, as hath been said in case of a trespassable entry into the house claiming a title, and not to commit felony.

But now by the statute of 24 *H.* 8. *cap.* 5. “ If any person
“ attempt any robbery or murder of any person in or near
“ any common highway, cartway, horseway, or footway, or
“ in their mansion-houses, or do attempt to break any man-
“ sion-house in the night-time, and shall happen to be kild
“ by any person or persons, &c. (tho a lodger or servant)
“ they shall upon their trial be acquitted and discharged in
“ like manner, as if he had been acquitted of the death of
“ such person. P. 15 *Car.* 1. *Cooper's case.* (e)

This statute was to remove a doubt, and was declarative and enacting, and puts the killing of a robber in or near the highway, &c. in the same condition with one, that intends to rob or murder in the dwelling-house, and exempts both from forfeiture, and hath settled the doubt.

And upon this statute it was, that when there was malice between *A.* and *B.* and they had fought several times, and after met suddenly in the street near *Ludgate*, and *A.* said he would fight him, *B.* declined it, and fled to the wall, and called others to witness it, and *A.* pursued him, and struck him first, and *B.* in his own defense kild him, he was acquitted from any forfeiture by the statute of 24 *H.* 8. *cap.* 5. 15 *Eliz.*

Cromp.

Cromp. 27. b. *Copston's case*: but upon this statute these things are observable.

1. It extends not to the case of a bare trespassable entry into a house, but only to such an entry or attempt, as is intended to be for murder or robbery, &c. or some such felony, and therefore the cases of trespasses either in houses or near highways are left as before.

2. It seems, that it extends not to indemnify the killing of a felon, where the felony is not accompanied with force, for it speaks of *robbery*, therefore the killing of one, that attempts to pick my pocket, is not within the act, for there is no such necessity; indeed, if any felon, after a felony committed, doth resist those, that endeavour to apprehend him, or fly, and be kild, this killing is no felony, but that is upon another account, for this statute hath relation only to killing before, or in the felony committed, not after.

3. It speaks only of breaking the house in the *night-time*, so that it seems it extends not to a breaking the house in the *day-time*, unless it be such a breaking, as imports with it apparent robbery, or an intention, or attempt thereof.

4. Tho the statute speaks not of burning of houses, yet he, that attempts the wilful burning of a house, and is kild in that attempt, is free from forfeiture without the aid of this statute, as appears 26 *Affix.* 23.

By the judicial law, *Exod.* xxii. 2, 3. *If a thief be found breaking up, and he be smitten that he die, no blood shall be shed for him, but if the sun be risen upon him, there shall blood be shed for him, for he should make restitution, and if he have nothing, he shall be sold for his theft*: and by the Roman law of the twelve tables, *Fur manifesto furto deprehensus, si aut, cum faceret furtum, nox esset, aut inter-diu se telo, cum deprehenderetur, defenderet, impune occideretur* (f): upon the latter of these laws the civilians and canonists have made many curious distinctions, *quas vide apud Covarruviam, Tom. I. Par. 3. de homicidio ad defensionem commisso* (g); and upon the former the

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(f) *Dig. Lib. IV. tit. 2. ad leg. A. vide supra cap. 1. p. 5 & 6. quil. l. 4. §. 1. Agel. Lib. XI. cap. 12.* (g) p. 561. *Edit. Antwerp 1614.*

the *Jewish* Rabbies have made the like, *quas vide apud Selden de jure gentium.*

But as the laws of several nations in relation to crimes and punishments differ, and yet may be excellently fitted to the exigencies and conveniencies of every several state, so the laws of *England* are excellently fitted in this and most other matters to the conveniencies of the *English* government, and full of excellent reason, and therefore I shall not trouble myself about other laws than those of *England.* (b)

IV. There remains yet one other particular, namely, the killing a malefactor, that doth not yield himself to justice upon pursuit.

If a person be indicted of felony and flies, or being arrested by warrant or process of law upon such indictment escapes and flies, and will not render himself, whereupon the officer or minister cannot take him without killing of him, this is not felony, neither shall the killer forfeit his goods, or be driven to sue forth his pardon, but upon his arraignment shall plead *not guilty*, and accordingly it ought to be found by the jury. 3 *E.* 3. *Coron.* 288.

But if he may be taken without such severity, it is at least manslaughter in him, that kills him, therefore the jury is to inquire, whether it were done of necessity or not. 22 *Affiz.* 55. *Stamf. P. C. Lib. I. cap. 5. fol. 13. b.*

And the same law it is, if *A.* commits felony and flies, or resists the people, that come to apprehend him, so that he cannot be taken without killing him, such killing is not felony, nor does the person, that did it, forfeit any thing, tho *A.* were not indicted, nor the person, that did it, had any warrant of any court of justice, for in such case the law makes every person an officer to apprehend a felon. 22 *E.* 3. *Coron.* 261.

And the same law it is, if he be taken, and in bringing to the gaol he breaks away, and the people of the vill pursue and cannot take him, unless they kill him, those, that kill him, upon their arraignment shall be acquitted of the felony, but

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(b) By the common law, *Qui latronem occiderit nocturnum vel diurnum, non tenetur, si aliter periculum evadere non possit, tenetur tamen, si possit.* *Bract. Lib. III. de corona, fol. 155. a.*
Vide LL. Withred. Edit. Wilk. p. 12.
LL. Inæ, l. 16, 20, 21, 35. LL. Ethelstani, l. 11. LL. Canuti, l. 59.

yet the township shall be amerced for the escape, and the person kild shall forfeit his goods upon the flight found. 3 E. 3. Cor. 328, 340. and by some it hath been held he shall forfeit the issues of his lands, till the year and day be past. 3 E. 3. Coron. 290.

If *A.* be suspected by *B.* to commit a felony, but in truth he committed none, neither is indicted, yet upon the offer to arrest him by *B.* he resists, or flies, whereby *B.* cannot take him without killing him, and *B.* kill him, if in truth there were no felony committed, or *B.* had not a probable cause to suspect him, this killing is at least manslaughter, but if there were a felony committed, and *B.* hath cause to suspect *A.* but in truth *A.* is not guilty of the fact, tho upon this account *B.* may justify the imprisonment of *A.* yet *quere*, if *B.* kill *A.* in the pursuit, whether this will excuse him from manslaughter.

But if a felony be committed, but not by *A.* but by some other, and *B.* hath a warrant from a justice of peace to apprehend *A.* or that a hue and cry comes to *B.* the constable of *D.* to apprehend *A.* who endeavours to escape, or stands in resistance, so that he cannot be taken without killing him, it seems the killer is excused from felony, tho *A.* were not indicted; *vide pro hoc* 3 E. 3. Coron. 289. and the reason is, because he is bound by law to execute his warrant, or pursue the party upon hue and cry and to apprehend him, and is indictable for a contempt if he doth not, and so it differs from the former case, for no man is bound to suspect another, but it is the act of his own judgment, and so he is merely his own warrant, and he may not adventure so far as the death of a party, unless he be sure he was the offender, tho he may imprison him, for thereupon he shall be brought to his trial; *sed de his vide Stamf. P. C. Lib. I. cap. 5. Crompt. fol. 30.*

And it is to be observed, that whether the party rescues himself after he is taken, and fly or resist, or whether he fly or resist before his taking, and be kild in the pursuit, it is all one, the killer forfeits nothing, but the person kild forfeits his goods, tho he were kild before attainder, upon an inquisition

tion either by the coroner or petit jury finding his flight. 3 E. 3. *Coron.* 288, 328.

By the statute of 21 E. 1. *de malefactoribus in parcis*, if a parker, forester, or warrener, find any trespassers wandering in his park, forest, or warren, intending to do damage therein, and they will not yield to the forester after hue and cry made to stand to the king's peace, but fly or defend themselves, whereupon they are kild, the parker, forester, warrener, or their assistants shall not lose life or limb for the same, but shall enjoy the king's peace, so it be not done upon any former malice or evil will; but to make good such justification by a parker, forester, or warrener, there are these things requisite: 1. It must be a legal forest, park, or warren, or chace, (for a chace includes warren) and not a bare warren, park, &c. in reputation, for if a man inclose a piece of ground, and put deer or conies in it, this makes it not a park or warren without a prescription-time out of mind, or the king's charter. 2. If a man have a park within a forest, where he may hunt, and the forester kill the purloin-man, or his servant hunting in the purloin, this doth not excuse the forester from murder or manslaughter, as the circumstances of the case are. *Dyer* 327. a.

And note, that in all these cases of homicide by necessity, as in pursuit of a felon, in killing him, that assaults to rob, or comes to burn or break a house, or the like, which are in themselves no felony, the matter may be specially presented by the grand inquest, (*quod vide* 3 E. 3. *Coron.* 305, 289. and several other places,) or by the coroner's inquest, and thus it was done in *Holme's* case, 26 *Eliz.* *Crompt.* 28. and in the case of a servant of justice *Croke*, who coming with the judge out of the circuit was assaulted in the highway, and he kild the assailant, and the matter presently specially found by the coroner's inquest, whereby he was discharged by the statute of 24 H. 8. *cap.* 5. and in these cases upon this special presentment the party shall be presently discharged without being put to plead, but then this acquittal by presentment is no final discharge, for he may be indicted and arraigned again afterwards, if the matter of the former indictment be false;

false; but if in such a case the presentment of the grand inquest or coroner's inquest be simply of murder or manslaughter, and thereupon he is arraigned and tried, and this special matter given in evidence, he shall be acquitted thereupon, for upon these special matters proved in evidence, he is not guilty, for it is no felony, and this acquittal is a perpetual discharge and bar against any other indictment for the same death; therefore this latter way is more advantageous in the conclusion for the party, than a special presentment. *Crompt. fol. 28. Holme's case.*

C H A P. XLI.

Concerning the forfeiture of him, that kills in his own defense, or per infortunium.

IF a man kill another by misfortune, yet he shall forfeit his goods in strictness of law, in respect of the great favour the law hath to the life of a man, and to the end that men should use all care, diligence and circumspection in all they do, that no such hurt ensue by their actions.

But if the occision or killing can by no means be attributed to the act of the person, but to the act of him, that is kild, there it seems, tho the instrument of the death is forfeited as a deodand, there follows no forfeiture of the goods of the person: for instance,

If *A.* shoots at rovers, as he may lawfully do, if *B.* after the arrow deliverd runs into the place, where the arrow is to fall, of his own accord, and so is kild, this seems to be such an *infortunium*, that affects not *A.* with the loss of goods, for it was not his act, that contributed to the death of *B.* but the wilful or improvident act of *B.* himself; *quere.*

If *A.* assaults *B.* and *B.* in his own defense kills *A.* yet *B.* forfeits his goods.

If the coroner's inquest find the killing specially *se defendendo*, yet the court shall arraign him, and try him, whether it were *se defendendo*, before he shall have his pardon of course.

4 *H.* 7. 1 \S 2.

But if *B.* having a pitch-fork in his hand, *A.* assaults *B.* so fiercely, that he runs upon the pitch-fork of *B.* *B.* offering no thrust at all against *A.* (tho this be a very difficult matter of fact to suppose, yet if the fact be supposed to be so) it seems *B.* forfeits no goods, because it was the act of *A.* himself, and some have said rather, that in that case *A.* is *felo de se*, and forfeits his goods, *de quo supra*, 44 *E.* 3. 44. *Coron.* 94. tho 3 *E.* 3. *Coron.* 226. saith his goods are forfeit in that case.

But where the killing of a man in his defense is in the law no felony, but the party upon his arraignment upon the special matter is to be found or judged simply not guilty, there is no forfeiture, but the party ought to be absolutely acquitted, unless he fled, and it be found, that *fugam fecit*, for that is a distinct forfeiture, altho the party be not guilty of the fact, and therefore always the jury is charged to inquire, whether the prisoner be guilty or not guilty, and if not guilty, whether he fled for the same, and if he fled, then to inquire also of his goods and chattles.

And the cases, where the prisoner is not to forfeit any goods or chattles, but is to be absolutely acquitted, if he kill in his own defense, are before remembred, and I here recollect them.

1. He that kills a thief, that attempts to rob him.

2. He that kills a person, that attempts to rob or kill him in or near the highway, or in the mansion of the killer, by the statute of 24 *H.* 8. *cap.* 5. and this, tho he hath not yet actually robbed. 3 *E.* 3. *Coron.* 330.

3. He that kills a person, that attempts wilfully to fire his house, or to commit burglary, tho he hath not actually broken or fired the house, 26 *Assiz.* 23. 29 *Assiz.* 23. if he came with that purpose.

4. An officer or bailiff, that in execution of his office kills a person, that assaults him, tho the officer gives not back to the wall, for the officer is under the protection of the law, and the books tell us it is not felony in such case. *Co. P. C. p. 65.*

5. The same law is of a constable, that commands the king's peace in an affray, and is resisted.

6. He that kills a felon, that resists, or *justiciari se non permittit*, and the like of a constable or watchman, that is charged to take a person charged with felony, or attempts to take him upon hue and cry, if the person so charged resist or fly, and cannot be otherwise taken, tho perchance he be innocent, for the reason before given, and this either before or after the arrest.

7. If there be a great riot, or rebellious assembly, how far the killing of such persons in suppressing of them is criminal is to be seen.

By the statute 1 *Mar. cap. 12.* " If any persons to the
 " number of twelve or more shall intend, practise, or put
 " in ure to overthrow pales, hedges, ditches, or inclosures of
 " parks or other grounds, banks of fish-ponds, conduit-heads,
 " or pipes, or to pull down dove-cotes, barns, houses, mills,
 " or burn stacks of corn, or abate rents or price of victual
 " or corn, and being required by the justices of peace, she-
 " riff of the county, mayors, bailiffs or head officers of ci-
 " ties by proclamation in the queen's name to retire to their
 " homes, shall remain together one hour after such procla-
 " mation, or shall put in ure such things, they shall be ad-
 " judged felons.

" And if any persons above the number of two shall un-
 " lawfully assemble to put in ure the things aforesaid, that
 " it shall be lawful for the sheriff, justices of peace, mayors,
 " bailiffs, and every other person having commission from
 " the queen to raise force in manner of war to be arrayed to
 " suppress and apprehend the rioters, and if the persons so
 " unlawfully assembled after command and request by pro-
 " clamation shall continue together, and not return to their
 " habitations, and if any of them happen to be kild, maimed

“ or hurt in or about the suppressing or taking them,
“ the sheriff, justice, mayor, &c. and their assistants, shall
“ be discharged and unpunishable for the same against the
“ queen and all other:” this act was continued by the statute of 1 *Eliz.* cap. 16. during her life. (a)

And it seems, as to this manner of killing rioters, that resist the ministers of justice in their apprehending, it is no other but what the common law allows, or at least what the statute of 13 *H. 4.* cap. 7. implicitly allows to two justices of the peace with the sheriff or under-sheriff of the county by giving them power to raise the *posse comitatus*, if need be, and to arrest the rioters, and they are under a penalty of 100 *l.* if they neglect their duty herein.

And with this agrees Mr. Dalton, cap. 46. p. 115. (b), cap. 98. p. 249. (c), and *Crompt. de Pace* 62. b. “ Nota, que vis-à
“ count & justices de peace point prendre tants des homes
“ in harneys, quant sont necessary & guns &c. & tuer les
“ rioters, s'ils ne voient eux rendre, come fuit pris in case
“ de *Drayton Bassett*, car le statute 13 *H. 4.* cap. 7. parle, qu'ils
“ eux arrestent, & si les justices ou ascuns de leur company
“ tue ascun des rioters, qe ne voil render nest offence in lui,
“ come fuit auxi prise in le dit case de *Drayton Bassett* (d);”
and *noté*, that tho the statute of 1 *Eliz.* was then in force, yet that was not a case within that statute, nor depending on it.

And it seems the same law is for the constable of a vill in case a riot happen within a vill, he may assemble force within his vill to arrest the rioters, and if he or those assembled in his assistance come to arrest the rioters, and they resist, and be kild by the constable or any of his assistants, the constable and his assistants are dispunishable for the same, for he is enabled hereunto by the common law, as being an officer for the preservation of the peace, and may command persons to his assistance, and if they refuse, they are fineable for it.

And

(a) 1 *Geo.* cap. 5. a new act was made to the same purport, which is perpetual.

(b) *New Edit.* cap. 182. p. 297.

(c) cap. 150. p. 481.

(d) See also *Crompt.* 23. b.

And farther, the statute of 17 R. 2. *cap.* 8. commands and authorizes the king's ministers to use all their power to take and suppress such riots and rioters, and a constable is the king's minister; and the statute of 13 H. 4. *cap.* 7. is no repeal of this statute, so that the killing of a rioter by a sheriff, justice of peace, or constable, when he will resist and not submit to the arrest, seems to be no felony at common law, nor makes any forfeiture, for they do but their office, and are punishable, if they neglect it.

8. If the prisoners in gaol assault the gaoler, and he in his defense kill any of them, this is no felony, nor makes any forfeiture. 22 *Affiz.* 5. *per Thorp, adjudge per tout le council.*

C H A P. XLII.

Concerning the taking away of the life of man by the course of law, or in execution of justice.

THIS kind of occision of a man according to the laws of the kingdom and in execution thereof ought not to be numbred in the rank of crimes, for it is the execution of justice, without which there were no living, and murders, burglaries, and all capital crimes would be as frequent and common, as petit trespasses and batteries.

The taking away of the life therefore of a malefactor according to law by sentence of the judge, and by the sheriff or other minister of justice pursuant to such sentence, is not only an act of necessity, but of duty, not only excusable, but commendable, where the law requires it.

But because there are some cautions and considerations in this matter, I have added it to the close of this title of homicide.

Regularly it is not lawful for any man to take away the life of another, tho a great malefactor, without evident necessity, whereof before, or without due process of law, for the deliberate uncompelled extrajudicial killing of a person attaint of treason, felony, or murder, or in a *premunire*, tho upon the score of their being such, is murder. (a)

Therefore it is necessary, 1. That he, that gives sentence of death against a malefactor, be authorized by lawful commission or charter, or by prescription to have cognizance of the cause. 2. That he that executes such sentence be authorized to make such execution, otherwise it will be murder or manslaughter, or at least a great misprision in the judge that sentenceth, or in the minister that executeth.

I. As touching the authority of the judge, I shall not at large discourse the jurisdiction of the judges or courts in this place; it will be more proper hereafter, but shall mention only some things, that may be seasonable for this place.

If he, that gives judgment of death against a person, hath no commission at all, if sentence of death be commanded to be executed by such person, and it is executed accordingly, it is murder in him, that commands it to be executed, for it was *coram non iudice*.

If a commission of the peace issue, this extends not to treason, neither can justices of peace hear and determine all treasons by force of this commission, for it extends only to felonies, (tho some treasons are by act of parliament limited to their cognizance, as hath been before observed) if they take an indictment of treason, and try and give judgment upon the party, this is most certainly erroneous, and possibly avoidable by plea, but I do not think it makes the justices guilty of murder in commanding the execution of such sentence, for they were not without some colour of proceeding therein, because all treason is felony, tho it be more, and the king may, if he please, proceed against a traitor for fe-

lony, and antiently a pardon of all felonies discharged some treasons. 1 E. 3. *Charter de Pardon* 13. 22 *Affiz.* 49. Co. P. C. p. 15. but it is a great misprision in such justices.

The justices of the common pleas cannot hold plea upon an indictment or appeal in capital causes, it will be at least erroneous, if not voidable by plea, but if they hold plea in appeal of death by writ, and give judgment therein for the party to be hanged, which is executed accordingly, I think it is an error, and a great misprision in them, but not felony, because they had colour to hold plea thereof by an original writ out of the chancery under the great seal.

Upon the same reason I take it, that if there be a writ sent to the sheriff, escheator, or A. B. and C. to hear and determine felonies, whereas it ought to be a commission, 42 *Affiz.* 12, 13. and they proceed thereupon to a judgment and execution in case of felony, it is a great misprision, but I think it makes not the judge nor executioner guilty of murder; the same law I take to be in *Lacie's case*, *quod vide Co. P. C. p. 48. 5 Co. Rep. 106. a. Constable's case.* The commissioners upon the statute of 28 H. 8. had given judgment of death against him, that struck at sea, and the party died at land; and the same law I take to be, where he, that hath the franchise of *Infangthief*, gives judgment of death against a felon not within his jurisdiction, 2 R. 3. 10. b. the case of the abbot of *Crowland*; it might be a cause of seizure of the liberty, but makes not the steward guilty of murder.

And what I have said of a proceeding in capitals without the strict extent of their commission may be said of the like proceeding, where in strictness of law the commission happens to be determined.

A commission of gaol-delivery issues to A. B. &c. they sit one day, and forget to adjourn their commission, or the clerk forgets to enter the adjournment, a felony is committed the next day, and they proceed in sessions, and take an indictment, and give judgment of death against the malefactor, this judgment is erroneous, and the clerk of assizes shall never be permitted to amend the record, and enter an adjournment, this judgment is erroneous, and shall be reversed, but

it makes not the judges guilty of murder or homicide, tho in strictness of law their commission was determined by the first day's session without adjournment.

King *James* issued out several commissions of gaol-delivery, &c. the justices went their circuit, the king died, yet they proceeded, and before notice of the king's death condemned and executed many prisoners; it is held these proceedings were good, and the commissions stood till notice of the king's death, *M. 3 Car. C. B.* Sir *Randolph Crew's* case (*b*), tho in strictness of law their commissions were determined by the king's death; but suppose they were both in law and fact determined, the judgments, that happend upon sessions begun after the king's death, would be erroneous, but the judges had not been criminal in commanding the execution of their sentence before notice, for if *ignorantia juris* doth in some cases excuse a judge, much more doth *ignorantia facti*.

If a commission of gaol-delivery issue to *A. B.* and *C.* in the county of *D.* and afterward a second commission of gaol-delivery in the same county issue to *E. F.* and *G.* and there is notice given to the former commissioners, but no session by virtue of the second commission, whereupon the former proceed notwithstanding that notice *in pays*, (as conceiving it insufficient, unless either a writ of *Supersedeas* had been sent them, or at least a session by the second commission) and they proceed in cases capital, this makes them not guilty of felony, *34 Affiz. 8.* because tho the second commission be effectual for them to proceed without any actual revocation by *Supersedeas*, or otherwise of the former, yet the former is not actually determined, till a *Supersedeas* or a session by virtue of the second commission, upon an extrajudicial notice, or a notice *in pays*, the first commissioners may, if they please, forbear any further session, but they are not bound to take notice of rumours and reports; the like in case of a sheriff, *M. 25 Eliz. Moore 333. 5 E. 4.*

If in the time of peace a commission issue to exercise martial law, and such commissioners condemn any of the king's subjects (not being lifted under the military power) this is
without

(*b*) *Cro. Car. 98.*

without all question a great misprifion, and an erroneous proceeding, and accordingly adjudged in parliament in the case of the earl of Lancaster, *Parl. 1 E. 3. part 1. de quo supra p. 344.*

And in that case the exercise of martial law in point of death in time of peace is declared murder. *Co. P. C. p. 52.*

But suppose they be listed under a general or lieutenant of the king's appointment under the great seal, and modelled into the form and discipline of an army, either in garrison or without, yet as long as it is *tempus pacis* in this kingdom, they cannot be proceeded against as to loss of life by martial law; and the same for mariners, that are within the body of the kingdom, but their misdemeanors, at least if capital, are to be punished according to the settled laws of the kingdom, *3 Car. cap. 1.* the petition of right; yea, and it seems as to mariners and soldiers at sea, when in actual service in the king's ships, they ought not to be put to death by martial law, unless it be actually in time of hostility; and this appears by the statute of *28 H. 8.* that settled a commission to proceed criminally in cases of treason and felony, and by the late act of *13 Car. 2. cap. 9.* settling special orders under pain of death by act of parliament (c); but indeed, for crimes committed upon the high sea, the admiral had at common law a jurisdiction even unto death *secundum leges maritimas*, but this was a different thing from martial law.

And this appears also by the statute of *13 R. 2. cap. 2.* the constable and marshal, who are the *judices ordinarii* in cases belonging to the martial law, are yet thereby declared to have no jurisdiction within the realm, but of things that touch war, which cannot be discussed nor determined by the common law.

It must therefore be a time of war, that must give exercise to their jurisdictions, at least in cases of life.

And thus far concerning the judicial sentence of death, where and when it is homicide criminally, and when not.

II. Now a few words concerning the officer executing such sentence, and where and when he is culpable in so doing.

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(c) And this appears also from the desertion, *3 Geo. 1. cap. 2. & multos annual statutes for punishing mutiny or alios.*

Wheresoever the judge hath jurisdiction of the cause, the officer executing his sentence is not culpable, tho the judge err in his judgment, but if the judge have no manner of jurisdiction in the cause, the officer is not altogether excusable, if he execute the sentence.

In the great courts of justice, as of *oyer* and *terminer*, gaol-delivery, and of the peace regularly the sheriff of the county, or those that he substitutes as under-sheriff, gaoler, or executioner, are the ordinary ministers in execution of malefactors, and they are to pursue the sentence of the court, and therefore, 1. If he vary from the judgment, as where the judgment is to be hanged, if he behead the party, it is held murder (*d*). 2. It must be done by the proper officer, *viz.* the sheriff or his substitute, if another doth it of his own head, it is held murder: *vide Co. P. C. p. 52.*

The use heretofore was, and regularly should be so still, that if sentence of death be given by the lord high steward, a warrant under the seal of the lord steward, and in his name should issue for the execution, and the like by three at least of the commissioners of *oyer* and *terminer*, where sentence of death is given by them. *Co. P. C. p. 31.*

But use hath obtaind otherwise before commissioners of gaol-delivery, for there is no warrant under the seal of the justices for execution, but only a brief abstract or calendar left with the sheriff or gaoler, and I remember Mr. justice Rolle would never subscribe a calendar, but after judgment given would command the sheriff in court to do execution, and for not doing it, he fined *Varney* the sheriff of *Warwickshire* 2000 *l.*

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(*d*) Of this opinion was also lord *Coke*, *Co. P. C. p. 52, 211.* notwithstanding it had been practised otherwise in some instances, as in the case of queen *Anne Boleyn*, and queen *Katherine Howard*, in the time of *Henry VIII.* the duke of *Somerset* in the time of *Edward VI.* and the lord *Audley* in the time of *Charles I.* upon the authority of which cases the lady *Alice Lisle* was beheaded for treason 1 *Jac. II.* See *State Tr. Vol. IV. p. 129.*

50, 1719. at the *Old-Baily*, who were both sentenced for high treason, and were hanged till they were dead, without any quartering or beheading, altho this was not only different from, but contrary to the sentence in high treason, which orders, that they shall be hanged, but not till they are dead: but as lord *Coke* says in the place above-mentiond, *Judicandum est legibus non exemplis*, and indeed, since the judgment is the warrant for the execution, it should seem that every execution, which is not pursuant to the judgment, is unwarrantable.

So in the cases of *Ashton*, 19 *Jan. 1690.* at the *Old-Baily*, (*State Tr. Vol. IV. p. 483*) and *Mattheyses* the printer, *Octob.*

If a prisoner be removed into the king's bench by *Habeas Corpus*, or taken upon an indictment of felony in *Middlesex*, and be committed to the marshal, and upon his arraignment be found guilty, and hath judgment to die, the court may send the person to *Newgate*, and command the sheriff of *Middlesex* to do execution, but if he be remitted to the marshal, (as regularly he ought to be,) then the marshal is the proper officer of the court to do execution, and he may execute the offender in *Middlesex*, where-ever the offense was committed (*e*), and the court may *ore tenus*, or by their order, command the sheriff of *Middlesex* to be assisting, but the entry upon the roll ought to be, *Et præceptum est marescallo, &c. quod faciat executionem periculo incumbente*; and thus it was done *H. 24 Car. 2.* upon a conviction of murder committed in *Kent* upon a trial at the king's bench bar, upon search and producing of many ancient and late precedents, for regularly he, that is the immediate minister of the court, ought to make execution, and such is the marshal to the court of king's bench, especially where the persons are committed to his custody, and this is done without any writ, but only by the command of the court *ore tenus*.

And thus far concerning the death or killing of a man, where it is not, and where it is punishable, and the several degrees thereof.

(*e*) See *Althoes* case *supra in notis* p. 374. who were executed in *Middlesex* for a fact in *Wiltshire*, and the case of *Laver*, *State Tr. Vol. VI. p. 332.* who was executed in *Middlesex* for a fact in *Essex*.
 See also the case of *Fitz-Patrick* and *Brodway*, *State Tr. Vol. I.*

C H A P. XLIII.

Of larciny, and its kinds.

ALtho the offenses of burglary and arson are of an higher nature, than larciny, yet because there be some things, that fall under the consideration of larciny, that are necessary to be known previously to the consideration of burglary, &c. I shall begin with this.

Larciny or theft under the various laws of several countries hath been under various degrees of punishment: in some countries the punishment was triple or fourfold restitution, as among the *Jews* (a), in others deportation or banishment, or condemning to several employments, as among the *Romans*. (b).

And in *England* in antient time the punishment of theft was not fixed or settled, and altho *Hoveden* and *Simon Dunelmensis* tell us, that *firmissimâ lege statuit Henricus primus, quod fures latrocinio deprehensi suspendantur*, yet in the time of *Henry II.* they were otherwise punished; *quod vide apud Selden Fur. Ang. p. 83.* But the same law touching the punishment of grand larciny with death seems to have been fixed and settled ever since the time of *Henry II.* and *Bracton*, that wrote in the time of *Henry III.* takes it as a thing settled and commonly practised in his time; *vide ipsum Lib. III. cap. 32. p. 151. b. (*)*

Now touching the kinds of larcinies they are two, *viz.* either simple larciny, or larciny accompanied with violence or putting in fear, which is called robbery.

Simple larciny or theft is of two kinds, *viz.*

Grand larciny, when it is above the value of twelve-pence.

Petit larciny, when only of the value of twelve-pence or under.

The nature of the offense is the same in both, but the degrees of their punishment differ, as shall be said.

And

(a) *Vide supra p. 9.* (b) *Vide supra p. 11.* (*) *Vide supra p. 12. & notas ibidem.*

And therefore what is said concerning grand larciny here is applicable to petit larciny, except as to the point of punishment, for the punishment of grand larciny is death and loss of goods, the punishment of petit larciny is loss of goods and whipping, but not death.

Simple larciny is defined by *Brañton* (c) and *Britton* (d) to be *fraudulenta contrectatio rei alienæ cum animo furandi invito domino, cujus res illa fuerit*: by my lord *Coke* to be the felonious and fraudulent taking and carrying away by any man or woman of the mere personal goods of another, neither from the person, nor by night, in the house of the owner. *Co. P. C. p. 107.*

I shall pursue his method in that chapter with such additions as shall be requisite.

The indictment runs *vi & armis felonice furatus fuit, cepit & asportavit* in case of dead chattles, *cepit & abduxit* in case of a horse, *cepit & effugavit* in case of sheep, cows, &c. wherein the words *felonice furatus fuit, cepit*, are essential to the crime.

This description gives us these heads of inquiry.

1. What a taking. 2. What a carrying away. 3. What a felonious taking and carrying away. 4. What the personal goods. 5. What the goods of another. 6. What or who may be said a taker.

These regularly are the ingredients into this crime of felony, and must be severally considered.

I. What shall be said a taking.

If *A.* delivers a horse to *B.* to ride to *D.* and return, and he rides away *animo furandi*, this is no felony; the like of other goods (e). *Co. P. C. p. 107. 28 Eliz. Butler's case.*

So if a man deliver goods to a carrier to carry to *Dover*, he carries them away, it is no felony; but if the carrier have a bale or trunk with goods deliverd to him, and he break the

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bale

(c) *Lib. III. de corona, cap. 32. fol. 150. b.*

(d) *cap. 15. p. 22. See also Fleta, Lib. I. cap. 38. p. 54.*

(e) Upon this principle it was doubted, whether a person hiring lodgings was

guilty of felony in stealing the goods he had hired with his lodgings. See *Kel. 24 & 81.* but this doubt is removed by 3 & 4 *W. & M. cap. 9.* whereby it is declared to be felony.

bale or trunk, and take and carry away the goods *animo furandi*, or if he carry the whole pack to the place appointed, and then carry it away *animo furandi*, this is a felonious taking by the book of 13 E. 4. 9. Co. P. C. p. 107.

But that must be intended, when he carries them to the place, and delivers or lays them down, for then his possession by the first delivery is determined, and the taking afterwards is a new taking: *vide* 21 H. 7. 14.

Before the statute of 21 H. 8. cap. 7. if a man had delivered goods to his servant to keep or carry for him, and he carrieth them away *animo furandi*, this had not been felony (*f*), but by that statute it is made felony, if of the value of forty shillings; but the offender shall at this day have his clergy (*g*); but yet if an apprentice (*b*) doth this, or if a man deliver a bond to his servant to receive money, or deliver him goods to sell, and he accordingly sells and receives the money, and carries it away *animo furandi*, this is neither felony at common law, nor by this statute. Co. P. C. p. 105. 26 H. 8. Dy. 5. a. b.

A. a servant of *B.* receives the rents of *B.* and *animo furandi* carries it away, this is not felony at common law, because *A.* had it by delivery, nor by the statute, because he had it not by the delivery of his master or mistress. *Dalt.* cap. 102. (*i*)

A. delivers the key of his chamber to *B.* who unlocks the chamber, and takes the goods of *A.* *animo furandi*, this is felony, because the goods were not delivered to him, but taken by him. 13 E. 4. 9. b.

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(*f*) This was a disputed point (see 3 H. 7. 12. b.) for which reason the statute of 21 H. 8. cap. 7. was made to settle the doubt, that was at common law, for in the before-mentioned case, 21 H. 7. 14. it is said to be felony, if he was intrusted with the keeping only within the house, stable, &c. because then the things are adjudged in the master's possession; but if he be intrusted to carry the things out of the house, &c. elsewhere, then it is not felony.

(*g*) By 27 H. 8. cap. 17. Clergy was

taken away, restored again by 1 E. 6. cap. 12. and again taken away by 12 Ann. cap. 7. from offenses committed in any dwelling-house or out-house, excepting in the case of apprentices under the age of fifteen years.

(*b*) The statute also excepts all servants within the age of eighteen years, this act which was repealed by the general words of 1 Mar. cap. 1. is revived by 5 Eliz. cap. 10.

(*i*) *New Edit.* cap. 155. p. 496.

He, that hath the care of another's goods, hath not the possession of them, and therefore may by his felonious embezzling of them be guilty of felony, as the butler, that hath the charge of the master's plate, the shepherd, that hath the charge of his master's sheep. 3 H. 7. 12. b. 21 H. 7. 15. a. Co. P. C. p. 108.

The like law for him, that takes a piece of plate set before him to drink in a tavern, &c. for he hath only a liberty to use, not a possession by delivery. 13 E. 4. 9.

And so it is of an apprentice, that feloniously embezzels his master's goods or money out of his shop, it is felony. Dalt. cap. 102.

If A. comes to B. and by a false message or token receives money of him, and carries it away, it is no felony, but a cheat punishable by indictment at common law, or upon the statute of 33 H. 8. cap. 1. by setting in the pillory.

If A. find the purse of B. in the highway, and take it and carry it away, and hath all the circumstances, that may prove it to be done *animo furandi*, as denying it or secreting it, yet it is not felony; the like in case of taking of a wreck or *treasure-trove*. 22 Affiz. 99. or a waif or stray.

But yet this taking of *treasure-trove*, waif, or stray must be where the party, that takes them, really believes them to be such, and colours not a felonious taking under such a pretense, for then every felon would cover his felony with that pretense.

Where a man's goods are in such a place, where ordinarily they are or may be lawfully placed, and a person takes them *animo furandi*, it is felony, and the pretense of finding must not excuse.

If a man's horse be going in his ground, or upon his common, and he takes it *animo furandi*, it is no finding, but a felony.

So it is if the horse stray into a neighbour's ground or common, it is felony in him, that so takes him, but if the owner of the ground take it *damage-feasant*, or the lord seize it, as a stray, tho perchance he hath no title so to do, this is not *felleo animo*, and therefore cannot be felony.

If the sheep of *A.* stray from the flock of *A.* into the flock of *B.* and *B.* drives them along with his flock, or by pure mistake shears him, this is not a felony, but if he know it to be another's, and marks it with his mark, this is an evidence of a felony.

A man hides a purse of money in his corn-mow, his servant finding it took part of it, if by circumstances it can appear he knew his master laid it there, it is felony; but then the circumstances must be pregnant, otherwise it may be reasonably interpreted to be a bare finding, because an unusual place for such a *dépositum*.

A. hath a design to steal the horse of *B.* enters a plaint of replevin in the sheriff's court for the horse, and gets him deliverd to him, and then rides him away, this is taking and stealing, because done *in fraudem legis* (*k*). *P. 15 Eliz. B. R. Co. P. C. p. 108.*

A. hath a mind to get the goods of *B.* into his possession, privately delivers an ejectment, and obtains judgment against a casual ejector, and thereby gets possession, and takes the goods, if it were *animo furandi*, it is larciny.

If *A.* steal the horse of *B.* and afterwards deliver it to *C.* who was no party to the first stealing, and *C.* rides away with it *animo furandi*, yet *C.* is no felon to *B.* because tho the horse was stolen from *B.* yet it was stole by *A.* and not by *C.* for *C. non cepit*, neither is he a felon to *A.* for he had it by his delivery.

But if *A.* steal the horse of *B.* and after *C.* steal the same horse from *A.* in this case *C.* is a felon both as to *A.* and as to *B.* for by the theft by *A.* *B.* lost not the property, nor in law the possession of his horse or other goods, and therefore in that case *C.* may be appeal'd of felony by *B.* or indicted of felony, *quod cepit & asportavit* the horse of *B.* *4 H. 7. 5. b. 13 E. 4. 3. b.*

And that is the reason, that if *A.* steal the goods of *B.* in the county of *C.* and carry them into the county of *D.* *A.* may be indicted for larciny in the county of *D.* for the continuance of the asportation is a new caption, but if he be
indicted

(*k*) See also *Kel.* 42.

indicted of robbery, it must be in the county of *C.* where the force and putting in fear was, *de quo postea.* 4 *H.* 7. 5. *b.*

II. The words of the indictment are not only *cepit*, but *cepit & asportavit*, or *abduxit* or *effugavit*.

If *A.* come into the close of *B.* and take his horse with an intent to steal him, and before he gets out of the close is apprehended, this is a felonious taking and carrying away, and is larciny. *Co. P. C.* p. 108, 109. Justice *Dalison's* reports.

So if a guest lodge in an inn, and takes the sheets of the bed with an intent to steal them, and carries them out of his chamber into the hall, and going into the stable to fetch his horse is apprehended, this is felony, and a felonious taking and carrying away, 27 *Affiz.* 39. *Co. P. C.* p. 108. and accordingly it was ruled 16 *Car.* 2. *B. R.* upon a special verdict found in *Cambridgeshire* (1), *A.* comes into the dwelling-house of *B.* nobody being there, and breaks open a chest and takes out goods to the value of five shillings, and lays them on the floor of the same room, and is apprehended before he can remove them, he was indicted upon the statute, and ousted of his clergy by the advice of all the judges, except one, for the taking out of the chest was felony by the common law, and the statute of 39 *Eliz.* cap. 15. alters not the felony, but ousts only the clergy. *Ex libro Bridgeman.*

A. hath his keys tied to the strings of his purse, *B.* a cutpurse takes his purse with money in it out of his pocket, but the keys, which were hanged to his purse-strings, hanged in his pocket, *A.* takes *B.* with his purse in his hand, but the string hanged to his pocket by the keys, it was ruled this was no felony, for the keys and purse-strings hanged in the pocket of *A.* whereby *A.* had still in law the possession of his purse, so that *licet cepit non asportavit*, 40 *Eliz.* *Wilkinson's* case cited *M.* 8 *Fac. C. B.* (m)

III. As it is *cepit* and *asportavit*, so it must be *felonicè* or *animo furandi*, otherwise it is not felony, for it is the mind, that makes the taking of another's goods to be a felony, or a bare trespass only, but because the intention and mind are secret, the intention must be judged by the circumstances of the fact,

fact, and tho these circumstances are various, and may sometimes deceive, yet regularly and ordinarily these circumstances following direct in this case.

If *A.* thinking he hath a title to the horse of *B.* seifeth it as his own, or supposing that *B.* holds of him distrains the horse of *B.* without cause, this regularly makes it no felony, but a trespass, because there is a pretense of title, but yet this may be but a trick to colour a felony, and the ordinary discovery of a felonious intent is, if the party doth it secretly, or being charged with the goods denies it.

If *A.* takes away the goods of *B.* openly before him or other persons, (otherwise than by apparent robbery) this carries with it an evidence only of a trespass, because done openly in the presence of the owner, or of other persons, that are known to the owner.

If *A.* leaves his harrow or his plow-strings in the field, and *B.* having land in the same field useth it, and having done either returneth them to the place, where they were, or acquaints *B.* with it, this is no felony, but at most a trespass.

If *A.* and *B.* being neighbours, and *A.* having an horse on the common, and *B.* having cattle there, that he cannot readily find, takes up the horse of *A.* and rides about to find his cattle, and having done turns off the horse again in the common, this is no felony, but at most a trespass.

So if my servant without my privity take my horse, and ride abroad ten or twelve miles about his own occasions, and return again, it is no felony, but if in his journey he sell my horse, as his own, this is declarative of his first taking to be felonious, and *animo furandi.*

But in cases of larciny the variety of circumstances is so great, and the complications thereof so mingled, that it is impossible to prescribe all the circumstances evidencing a felonious intent, or the contrary, but the same must be left to the due and attentive consideration of the judge and jury, wherein the best rule is *in dubiis* rather to incline to acquittal than conviction.

IV. It must be of goods personal, for otherwise no felony can be committed by taking them.

1. Therefore of chattles real no felony can be committed, and therefore the taking away of a ward cannot be felony, nor of a box or chest of charters, that concern land. 10 E. 4. 14. b. (n)

2. Neither can larciny be committed of things, that adhere to the freehold, as trees, grafs, bushes, hedges, stones or lead of a house, or the like. (o)

But if they are severed from the freehold, as wood cut, grafs in cocks, stones digged out of a quarry, then felony may be committed by stealing of them, for they are personal goods. 18 H. 8. 2. b. 12 E. 3. Coron. 119.

But if a man come to steal trees, or the lead of a church or house, and sever it, and after about an hour's time, or so, come and fetch it away, this hath been held felony, because the act is not continued but interpolated, and in that interval the property lodgeth in the right owner as a chattel, and so it was agreed by the court of king's bench 9 Car. 1. upon an indictment for stealing the lead of *Westminster-Abbey*. *Dalt. cap.* 103. p. 166. (p)

3. Neither of corn standing upon the ground, for tho it be a chattel personal, and goes to the executor, yet it favours of the realty, while it stands so. *Co. P. C.* p. 109.

4. Larciny cannot be committed of such things, whereof no man hath any determinate property, tho the things themselves are capable of property, as of *treasure trove*, or wreck till seized, tho he, that hath them in point of franchise, may have a special action against him, that takes them.

5. Larciny cannot be committed of things, that are *feræ naturæ*, unreclaimed, and *nullius in bonis*, as of deer or conies,

3

tho

(n) Nor can felony be committed of bonds, notes, or other writings, that are securities for a debt, because they derive their value from *choses en action*, which cannot be stolen. *Dalt. New Edit.* p. 501. 8 *Co. Rep.* 33. but by a late statute 2 *Geo. II. cap.* 25. the stealing of bonds, bills, notes, &c. is made felony with or without the benefit of the clergy in the same manner, as if the offender had stolen goods of the like value, with the money secured by such bonds, &c.

(o) But now by 4 *Geo. II. cap.* 52. it is felony to steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron rail or palisado fixed to any house, or out-house, or fences thereunto belonging, and every person, who shall be aiding or abetting, or shall buy or receive any such lead, &c. knowing the same to be stolen, is subjected to the same punishment.

(p) *New Edit. cap.* 156. p. 501.

tho in a park or warren, fish in a river or pond, wild-fowl, wild swans, pheasants.

But if any of these are kild, larciny may be committed of their flesh or skins, because now they are under propriety.

Of domestic cattle, as sheep, oxen, horses, &c. or of domestic fowls, as hens, ducks, geese, &c. and of their eggs, larciny may be committed, for they are under propriety, and serve for food.

Of those beasts or birds, that are *feræ naturâ*, but reclaimed and made tame or domestic, and serve for food, larciny may be committed, as deer, conies, pheasants, partridges, but then it must be, when he, that steals them, knows them to be tame, and so of reclaimed hawks, and likewise of the young of such larciny may be committed, but of the young of those beasts or birds, that are *feræ naturâ*, tho in a park, and tho the owner hath a kind of property *ratione loci, privilegii & impotentia*, yet larciny cannot be committed of them, as of young fawns in a park, young conies in a warren: of young pigeons in a dove-coat, fish in a trunk or net, larciny may be committed.

Of young hawks in the nest larciny may be committed, but not of hawks eggs, but the takers are punishable by fine and imprisonment upon the statute of 11 H. 7. cap. 17. and 31 H. 8. cap. 12. (r)

Of wild swans, nor of their young, larciny cannot be committed, but if they be made tame and domestic, or if they be marked and pinioned, it is felony to take them or their young.

But it seems, that if they be marked, and yet flying swans, that range abroad out of the precincts or royalty of the owner, it is not felony to kill and take them, because they cannot be known to belong to any: these several instances and differences may be collected from *Co. P. C. p. 109, 110. Dalt. cap. 103. (f)*, and 7 *Co. Rep. 15. b. Case de Swans & libros ibi.*

6. Lar-

(r) By this statute it is made felony to take hawks eggs out of any nests within the king's lands, but this is re-

peald by the general words of 1 *Mar. cap. 1.*

(f) *New Edit. cap. 156. p. 499.*

6. Larciny cannot be committed in some things, whereof the owner may have a lawful property, and such whereupon he may maintain an action of trespass, in respect of the baseness of their nature, as mastiffs, spaniels, gray-hounds, blood-hounds, or of some things wild by nature, yet reclaimed by art or industry, as bears, foxes, ferrets, &c. or their whelps or calves, because, tho' reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c. made tame, which, tho' wild by nature, serve for food.

Only of the reclaimed hawk, in respect of the nobleness of its nature and use for princes and great men, larciny may be committed, if the party know it to be reclaimed.

V. What shall be said the personal goods of any person, or of another person.

Every indictment of larciny ought to suppose the goods stolen to be the goods of somebody.

An indictment of larciny of the goods *cujusdam ignoti* is good, for it is at the king's suit, and tho' the owner be not known, the felony must be punished. 21 H. 6. *Enditement* 12.

And yet 10 H. 6. *Enditement* 9. an indictment, *quod A. verberavit B. and 20 jacks pretii 20 s. felonice cepit*, held good without shewing whose they were.

But an indictment of *A.* that he is *communis latro* without shewing in particular what he stole, is not good. 22 *Affix.* 73.

An indictment, that *bona domus & ecclesie tempore vacationis, or bona capelle in custodia J. S. felonice cepit*, is good, 7 E. 4. 14. b. *Co. P. C. p. 110. Stamf. P. C. p. 25. b. & 95. b.*

If a man steal bells, or other goods belonging to a church, he may be indicted, *quod felonice, &c. cepit bona parochianorum de B. M. 31 & 32 Eliz. B. R. Hadman and Green versus Ringwood (t)*, and yet an action of trespass lies for the churchwardens in such case, *quare bona & catalla parochianorum in custodia sua, or in custodia A. B. predecessorum suorum gardianorum ecclesie cepit & asportavit ad damnum parochianorum. T. 36 Eliz. B. R. Method and Barfoot. Dyer 99.*

If *A.* have a special property in goods, as by pledge, or a lease for years, and the goods be stolen, they must be supposed in the indictment the goods of *A.* If

(t) *Cro. Eliz.* 145, 179.

If *A.* bail goods to *B.* to keep for him, or to carry for him, and *B.* be robbed of them, the felon may be indicted for larciny of the goods of *A.* or *B.* and it is good either way, for the property is still in *A.* yet *B.* hath the possession, and is chargeable to *A.* if the goods be stolen, and hath the property against all the world but *A.*

A. is indicted, that he stole the goods of *B.* and it appears in the indictment, that *B.* was a *feme covert* at the time, the indictment is naught, for they are the goods of her husband, and so if *A.* be indicted for stealing the goods of *B.* and upon the evidence it appears, that *B.* had neither interest nor possession in the goods, or was a *feme covert*, the party ought to be acquitted, but then he may be presently indicted *de novo* for the goods of the husband or true proprietor; and so it once happend before me at *Aylesbury* 1667. in the case of *Emes*, who was convicted and executed upon a second indictment.

Regularly a man cannot commit felony of the goods, wherein he hath a property.

If *A.* and *B.* be joint-tenants or tenants in common of an horse, and *A.* takes the horse, possibly *animo furandi*, yet this is not felony, because one tenant in common taking the whole doth but what by law he may do.

Yet if *A.* take away the trees of *B.* and cut them into boards, *B.* may take them away, and it cannot be felony; so if *A.* take the cloth of *B.* and make it into a doublet, *B.* may take it, and it cannot be felony. *M. 2 Eliz. More n. 67. p. 19.*

If *A.* take the hay or corn of *B.* and mingles it with his own heap or stock, or if *A.* take the cloth of *B.* and embroider it with silk or gold, *B.* may retake the whole heap of corn, or cock of hay, or garment and embroidery also, and it is no felony, nor so much as a trespass. *H. 36 Eliz. B. R. Popham n. 2. p. 38.*

Yet if *A.* bail goods to *B.* and afterwards *animo furandi* steals the goods from *B.* with design probably to charge him for them in an action of detinue, this is felony; *quod vide* 7 *H. 6. 43. a. Co. P. C. p. 110. Stamf. P. C. p. 26. a.*

The wife cannot commit felony of the goods of her husband, for they are one person in law, 21 *H. 6. Coronæ* 455.

Co. P. C. p. 110. and therefore, if she take or steal the goods of her husband, and deliver them to *B.* who knowing it, carries them away, this seems no felony in *B.* for it is taken, *quasi* by the consent of her husband (*u*), yet trespass lies against *B.* for such taking, for it is a trespass, but *in favorem vite* it shall not be adjudged a felony, and so I take the law to be notwithstanding the various opinions. *Dalt. cap. 104. p. 268, 269. ex lectura Cooke. (x)*

But if the husband deliver goods to *B.* and the wife had taken them feloniously from *B.* this had been felony in the wife, *Dalt. cap. 104. p. 268.* for if the husband himself had taken them feloniously from *B.* it had been felony, as hath been said; but then it must in both cases be a taking *animo furandi.*

But if a man take away another man's wife against her will *cum bonis viri*, this is felony by the statute of *Westm. 2. cap. 34.* which saith, *Habeat rex sectam de bonis sic asportatis (y)*, 13 *Affiz. 6.* But if it be by the consent of the wife, tho against the consent of the husband, it seems to be no felony, but a trespass, for it cannot be a felony in the man, unless it be a felony in the woman, who consented to it, 13 *Affiz. 6.* but *Dalton* thinks it felony, *ubi supra.*

Yet in some cases the principal agent may be excused from felony, and yet he, that is principal in the second degree, may be guilty, as if a man put a child of seven years to take goods, and bring them to him, and he carry them away, the child is not guilty by reason of his infancy, yet it is felony in the other.

If *A.* die intestate, and the goods of the deceased are stolen before administration committed, it is felony, and the goods shall be supposed to be *bona episcopi de D.* ordinary of the diocese, and if he made *B.* his executor, the goods shall be supposed *bona B.* tho he hath not proved the will, and they need not shew specially their title as ordinary or executor, because it is of their own possession, in which case a general indict-

(*u*) But in case *B.* were her adulterer, Mr. *Dalton* thinks it would be felony, for in such a case no consent of the hus-

band can be presumed. *Dalton ubi infra.*

(*x*) *New Edit. cap. 157. p. 504.*

(*y*) 2 *Co. Instit. 434.*

indictment as well as a general action of trespass lies without naming themselves executor or ordinary, and so for an administrator.

But if servants in the house imbezzel their master's goods after his decease, this seems not to be felony at common law, but only trespass, because the goods were *quodammodo* in their custody; and therefore remedy is provided by the statute of 33 H. 6. cap. 1. that if they appear not upon proclamation, they shall be attaind of felony, but if they appear, they shall answer for it as a trespass.

But an indictment, *quod invenit hominem mortuum, & felonice furatus fuit duas tunicas* without saying *de bonis & catallis* of the executor or ordinary, is not good, and therefore the party was discharged. 11 R. 2. *Enditement* 27.

A. digged up a dead body out of the grave, and stole his shroud, and buried him again, this is reported by Mr. Dalton, cap. 103. p. 266. to be no felony, but a misdemeanor, for which the party was whipt, and accordingly I have seen it reported to be held 16 Jac. in Nottingham's case (z), *quia nullius in bonis*, but see Co. P. C. p. 110. in Haine's case (a) ruled by the advice of all the judges to be felony, and in the indictment the goods shall be supposed the goods of the executor, administrator, or ordinary.

But it is held, that if A. put a winding-sheet upon the dead body of B. and after his burial a thief digs up the carcase and steals the sheet, he may be indicted for felony *de bonis & catallis* A. because it transferd no property to a dead man. 12 Co. Rep. 112.

VI. I come to the sixth consideration, who may be said a person committing larciny, but of this I have at large treated before cap. 3, &c. and therefore shall say but little here.

An infant under the age of discretion regularly cannot be guilty of larciny, *viz.* under fourteen years, unless it appear by circumstances, that he hath a discretion more than the law presumes.

A mad-

(z) This case is mentioned by Dalton in *New Edit.* is cap. 156. p. 502. in the place cited by our author, which (a) 12 Co. 112.

A madman, *non compos*, or lunatic in the times of his lunacy cannot commit larciny, but ought to be found not guilty upon due evidence thereof.

A *feme covert* alone may be guilty of larciny, if done without coercion of her husband. 27 *Affiz.* 40.

But it hath generally now obtaind, that she cannot be guilty of larciny jointly with her husband, because presumed to be done by coercion of her husband. *Vide Dalt. cap. 104. (b) Stamf. P. C. fol. 26. a. & libros ibi.*

But this I take to be only a presumption till the contrary appear, for I have always thought, that if upon the evidence it can clearly appear, that the wife was not drawn to it by the husband, but that she was the principal actor and inciter of it, she is guilty as well as the husband, but *stabitur præsumptio, donec probetur in contrarium*, neither is the book of 2 E. 3. *Corone* 160. to the contrary, but in the book of 27 *Affiz.* 40. where she was indicted alone, inquiry was made, whether it were by coercion of the husband.

And therefore, if *A.* and *B.* his wife be indicted by these names of larciny, the indictment is not void, for the husband may be convicted, tho the wife be acquitted upon the presumption of her husband's coercion.

Again, the husband may be acquitted, and the wife found to have done the felony alone, for every indictment is several in law; or again, tho *primâ facie* the wife cannot be guilty of larciny, no nor of burglary, where the husband is party in the fact, (tho she may be guilty of murder or manslaughter jointly with her husband) and therefore *primâ facie* the wife in such case must be acquitted, yet for my part I think the circumstances may be such, that the wife may be as well guilty in larciny or burglary, as her husband.

If a servant commit felony by the coercion of his master, yet it doth not excuse the servant, tho it excuse the wife, as is before said, for the wife is inseparably *sub potestate viri*, but it is not so with a servant, for as he is not bound to obey his master's unlawful commands, so he may recover damages for any wrong done him by his master. *Dalt. cap. 104. p. 269. (c)*

C H A P.

(b) *New Edit. cap. 157. p. 503.*

(c) *New Edit. p. 504.*

C H A P. XLIV.

Concerning the diversities of grand larcinies among themselves in relation to clergy.

ALTHO the punishment of all grand larciny by the law is death (a), yet in relation to clergy, which is a kind of relaxation of the severity of the judgment of law, there is difference made by acts of parliament between some larcinies and others:

By the antient privilege of the clergy, and by the confirmation and special concession of the statute of 25 E. 3. cap. 4. the benefit of clergy was to be allowd in all treasons and felonies touching other persons, than the king himself and his royal majesty.

Therefore as well in grand larciny, as in other felonies, clergy is to be allowd, where it is not taken away by some subsequent act of parliament.

And in all those cases, wherein it is so taken away, the indictment of such larciny or other felony must bring the case within the particular provision of those statutes; which in such cases takes away clergy, otherwise it is to be allowd, tho upon the evidence it may fall out, that the truth of the fact appears to be such, as is within the special provision of those statutes, that so take away clergy.

The statutes therefore, that take away clergy in some particular larcinies, are these that follow:

I. By the statute of 23 H. 8. cap. 1. “ All persons found
“ guilty of robbing any church or chapel, or other holy
“ places, or of robbing any person in his dwelling-house, the
“ owner or dweller of the same house, his wife, children or
“ servants then being within, and put in fear and dread by
6 Q “ the

(a) In antient times it was in some in others with pillory, and the loss of cases punished with the loss of a thumb, an ear. *Corone* 434. *Britt.* 24. b.

“ the same, or for robbing any person in or near the high-
 “ way, and those, that are found guilty of abetting, procu-
 “ ring, helping, or counselling thereof, are exempt from the
 “ benefit of clergy, except such as are in the order of sub-
 “ deacon.

But upon this statute, tho there must be a stealing of goods, there need not be an actual breaking (*b*), for the stealing in the house, and putting the dweller, his wife or servants in fear, is robbery.

This statute extended only to a conviction by verdict or confession, but the statute of 25 *H. 8. cap. 3.* extended it to a standing mute, or challenging of above the number of twenty, or not directly answering, and also in case of an arraignment of a prisoner for a felony by bringing the goods he stole into one county, where he had first stolen the goods in a foreign county, in one of those manners mentioned in the statute of 23 *H. 8.* it gave power to the justices, upon examination of the fact, to put the prisoner from his clergy, but herein these things were observable: 1. It did not give power of examination, where the prisoner confessed the felony, but where he put himself upon his trial. 2. These examinations need not be recorded. 3. It did extend only to those cases, where the prisoner was to be ousted of his clergy by force of the statute of 23 *H. 8.* and not to other cases, where he was to be ousted of his clergy by any subsequent statute, and therefore upon a robbery in a dwelling-house, where the owner, his wife or servants were within, and not put in fear, he could not be ousted of his clergy by examination in a foreign county upon the statute of 25 *H. 8. Andersf. Rep. n. 158. p. 114. Co. P. C. cap. 52. p. 115.*

And therefore it was ruled in one *Cole's* case, a woman broke a dwelling-house in *Kent* in the day-time, none being there, and took away goods above the value of five shillings, and under the value of ten shillings, and carried the goods

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into

(*b*) In the case of robbing a church there must be an actual breaking to bring it within this statute; but by 1 *E. 6. cap. 12.* it is not necessary, for by that statute all felonious taking of goods

out of a church or chapel is ousted of clergy in all cases, except that of challenging above twenty, which defect is supplied by 3 & 4 *W. & M. cap. 9.*

into *Suffex*, where she was indicted of larciny, and upon examination it appeared she had broke the house, and took the goods *ut supra*, being above five shillings and under ten shillings, and the jury found accordingly, and she was burnt in the hand, and discharged, for a man in such a case should have had his clergy in the county of *Suffex*, because tho the statute of 39 *Eliz. cap. 15.* take away clergy in the proper county, yet the statute of 25 *H. 8.* as to examination and taking away clergy in a forein county extends only to felonies put out of clergy by 23 *H. 8.* or 5 & 6 *E. 6. cap. 10. coram domino* Bridgman in *Suffex ex libro suo.*

Again, the statutes of 23 *H. 8.* and 25 *H. 8.* did put accessaries before in such cases from the benefit of their clergy, as well as the principals, but as to that they are repealed by 1 *E. 6. cap. 12.*

But by the statute of 1 *E. 6. cap. 12.* tho the statute of 23 *H. 8.* be re-enacted as to the principals in the cases before mentiond, and also in cases of breaking of houses to the intent to steal, (any person being therein, and put in fear) if convict by verdict or confession, or standing mute, and not directly answering, yet it hath this general clause, *and in all other cases offenders shall have benefit of their clergy*, and therefore by this act these changes were wrought.

1. In the cases, where clergy was excluded by this act, there is no saving for persons in holy orders.

2. It repealed the statute of 25 *H. 8. cap. 3.* as to examination in a forein county, and for that reason the statute of 5 & 6 *E. 6. cap. 10.* was made, whereby that statute was revived, and stands now in force in every article thereof.

3. It restored clergy to accessaries before in all those cases, wherein they were ousted of clergy by 23 and 25 *H. 8.* and therefore the statute of 4 & 5 *Ph. & M. cap. 4.* was made, whereby accessaries before in murder, or robbery in any dwelling-house, or in or near the highways, are ousted of clergy upon conviction, outlawry, standing mute, or challenging above twenty, or not directly answering.

So that the statutes of 23 and 25 *H. 8.* stand at this day in force with this addition, that persons in holy orders stand
equally

equally exempt from the benefit of clergy with others by the statute of 1 E. 6. as to cases within that statute.

But if only a stranger were in the house, and neither the owner, his wife, children, or servants, this gives no discharge of clergy by the statute of 23 H. 8. and therefore there was provision in that case by the ensuing statute.

II. By the statute of 1 E. 6. *cap.* 12. breaking of any house by night or by day; any person being in the house or put in fear, if it were with an intent to steal, tho' nothing be stolen, a principal was excluded from clergy in all cases, except outlawry and challenging above twenty.

And also in a foreign county, yet if upon examination it be so found, he is ousted of clergy by the statute of 5 & 6 E. 6. *cap.* 10. but the accessory before or after is not ousted of clergy by this statute.

III. By the statute of 5 & 6 E. 6. *cap.* 9. “ If any person
“ be found guilty according to the laws of the land for rob-
“ bing any person or persons in his or their dwelling-houses,
“ or dwelling-places, the owner or dweller, his wife, chil-
“ dren or servants being within the same house or place, or
“ in any place within the precincts thereof, such offender
“ shall not be admitted to clergy, whether the owner or
“ dweller, his wife or children, then or there being, shall
“ be waking or sleeping.

“ And also he, that robs any person in any booth or tent,
“ in any fair or market, his wife, children or servant then
“ being within the booth or tent, shall be excluded from
“ clergy.

This statute is of force, and of great and daily use, and therefore it will be convenient to make some observations upon it.

Upon this statute these things are observable :

1. That it extends not to oust clergy in any case but upon conviction of the offender, either by verdict or confession, for a man that confesseth is found guilty by his confession, but it extends not to standing mute, challenging above twenty, or not directly answering. (c)

(c) But by 3 & 4 W. & M. *cap.* 9. it extends to all these cases, as also to the case of an outlawry.

And therefore it is considerable, whether, if a man be attaint by outlawry, he may not be admitted to his clergy as a clerk attaint, which, tho it avoid not the attainder, yet it may take off the execution, for clergy is allowable to a person attaint, if the case be within clergy, *Crompt. Jurisdic. of Courts* 126. b. (d) *Dy.* 205. a. b. and it is held, outlawry upon this statute excludes not clergy. 11 *Co. Rep.* 29. b. *Poulter's case.*

2. That yet by the statute of 4 & 5 P. & M. cap. 4. clergy is taken away in this case from the accessary before, as well as in case of standing mute and challenging above twenty, or not directly answering, for the statute of 4 & 5 P. & M. extends to accessaries before in all cases of robbing in dwelling-houses, as well those within this statute, as those upon the statute of 23 H. 8.

3. It hath been held by good opinion, that this statute extends only to him, that actually enters the house and steals there, and that therefore if A. B. and C. come to a house in the day-time with an intent to enter, and steal goods, and that A. only breaks and enters the house, and takes the goods, that A. only shall be excluded of his clergy, and B. and C. that were aiding and assisting should have their clergy: this was the opinion of divers judges at a meeting in *Serjeants-inn* 30 *Novemb.* 1664. who grounded themselves principally upon *Audley's case* (e) upon the statute of 39 *Eliz.* hereafter cited: but I think they are all to be excluded of their clergy upon this statute of 5 & 6 E. 6. and there cannot be a stronger authority in it, than the judgment of parliament in the statute of 4 & 5 P. & M. cap. 4. whereby it is enacted, "That
" if any person shall maliciously command, hire, or counsel
" any person to commit any robbery in any dwelling-house,
" he shall be excluded of clergy.

And certainly he, that is present, aiding, and abetting, is more than an accessary before, but then perchance the indictment must not run generally, *was present, aiding, and abetting*, but that B. and C. *did maliciously command, hire, or counsel A. to commit the fact,* *Dy.* 183. b. 11 *Co. Rep.* 37. a. *Poulter's case,*

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(d) *Crompt. Justice* 119. b.
and *Finche's case.*

(e) *Cro. Car.* 473. by the name of *Evans*

tho' in my own opinion the words *maliciously present, aiding, and abetting*, do countervail the former, and much more, and it cannot be intended, that the statute meant to take away clergy from those, that maliciously counsel or command, which at most makes but an accessory, and yet that he, that is present, and abetting, shall have his clergy.

But in my opinion all may be indicted, *quod fregerunt & intraverunt, &c.* as in case of burglary or robbery, and it differs from the statute of 39 *Eliz.* and the rather, because the statute of 4 & 5 *P. & M.* extends not to offenses made after by 39 *Eliz.*

4. This statute extends not to breaking of the house with an intent to rob it, but there must be an actual robbing, or taking away goods.

5. The robbing by day or night is within this statute.

6. The dweller, his wife, children or servants must be within the precinct of the house sleeping or waking, but it is not necessary they should be put in fear, neither is it necessary they should be in the same room, where the robbery is done.

7. But it is not enough, that a stranger be in the house, unless the owner, his wife, children, servants or some of them be in the house at the time also, tho' it be enough upon the statute of 1 *E. 6. cap. 12.*

8. There must be not only an actual stealing of some goods in the house, but an actual breaking of the house, for the statute speaks of robbing, which imports more than a bare taking of goods.

Aug. 14 Car. 1. Thomas Williams, Thomas Bates, and Richard Harper having broken the lodgings of Sir *H. Hungate* at *Whitehall*, and taken thence several goods of Sir *H. Hungate, Croke* and *Crawley* were advised with to pen the indictment, who agreed these points: 1. It must be laid for breaking the king's mansion-house called *Whitchall* (*f*), and stealing the goods of Sir *H. Hungate*, for all the lodgings in *Whitehall* were part of the king's house, and differed from an inn of court, where each chamber is a several mansion-house, because every one hath

a several interest in his chamber. 2. That upon the statute of 5 & 6 E. 6. the indictment need only be, that he broke the king's house called *Whitehall*, and stole the goods of Sir *H. Hungate*, divers of the king's servants then being in the house, without saying, that any body was put in fear (which was necessary by the statute of 23 H. 8.) but merely upon the statute of 5 & 6 E. 6. and accordingly the indictment was drawn. 3. That upon an indictment upon 23 H. 8. or upon 5 E. 6. there must be an actual breaking of the house, and also a robbery or stealing of some thing.

4. That if a thief come into the house, the doors being open, and then break open a chamber-door, and steal goods from thence, this is a breaking of the house within those statutes, and accordingly at the gaol-delivery at the *Old-Baily* 29 Aug. 14 Car. 1. those two justices being present, they were indicted, and *Harper* being fled, the other two were found guilty; *Williams* was reprieved before judgment, but *Bates* was executed, *ex libro Twisden*.

Upon this latter resolution it seems, that *Bayne's* case in *Popham's Rep.* 36 & 37 *Elix. n.* 10. was somewhat too severe (g), where one came into a tavern to drink, and stole a cup that was brought them to drink in, the owner and his servants being in the house, and upon this he was ousted of his clergy upon the statute of 5 & 6 E. 6. which case was doubted by the justices upon a meeting among them *Novemb.* 1664. but it was then agreed, if two come into a tavern to drink, the door being open, and divers of the family being in the house, and one goes up stairs and breaks a chamber-door, and steals goods, and both depart before the felony be discovered; resolved by us all, that clergy is taken away from him, that breaks open the door, if he be indicted upon the statute of 5 E. 6. but not from the other, for the breaking of the door was an act of violence, and so the breaking of a counter or chest (b); for a chest *vide postea*.

But tho the breaking of the door, or perchance of a counter, may be such an act, as may make it a robbery within the statute of 5 E. 6. yea, and altho in that case before-mentioned,

(g) This case denied to be law, *Kel.* 68.

(b) See *Kel.* 69.

tiond, and in a case upon a special verdict out of *Cambridge-shire* before-mentiond, it was held the breaking of a chest was all one as to this purpose with the breaking of a door, tho the chest were not fixed to the freehold, *quod vide antea cap.* 43. yet I must needs say, that the course at *Newgate* hath been always since my time, that the breaking open of a chamber-door, and of a counter or cupboard fixed to the freehold, hath brought it within the statute of 5 E. 6. to oust of clergy, yet when a party enters the doors open, and breaks up only a chest or trunk, and steals thence goods, that is not such a robbery, as is within the statute of 5 E. 6. to oust of clergy, and so was the difference agreed at *Newgate* 1671. upon the robbery of the cook of *Serjeants-inn* in *Fleet-street* by certain persons, that came in to eat, and slipt up stairs, and picked open a chamber-door, and broke open a chest, and stole plate of good value: it was agreed, that the picking open the lock of the chamber-door brought it within the statute to oust clergy, but the breaking open of a chest or trunk only would not oust clergy upon the statute of 5 E. 6. or 39 *Eliz.* and so by *Lee* secondary was the constant course at *Newgate* in his time.

As to robbery in booths or tents in fairs and markets within the 5 E. 6. *cap.* 12. *H.* 41 *Eliz.* *B. R.* the robbing of a shop in *Westminster-hall* was ruled not to be within this statute to be ousted of clergy.

If a servant open a chamber-door in his master's house, and steals goods, *Sir N. Hyde*, who was severe enough in cases criminal, doubted whether this were within this statute to oust him of his clergy: *vide infra.*

IV. The next statute relating to this matter of robbing in houses is 39 *Eliz.* *cap.* 15. which recites, that the penalty of robbing of houses in the day-time, no persons being in the house at the time of the robbery committed, is not so penal, as robbery in any house, any person being therein at the time of the robbery committed, which hath emboldened persons to commit heinous robberies in breaking and entering persons houses, none being in the same, and enacts, " That if any
" person shall be found guilty by verdict, confession, or other-
" wise

“ wife for the felonious taking away in the day-time of mo-
“ ney, goods, or chattels to the value of five shillings or up-
“ wards in any dwelling-house, or any part thereof, or any
“ out-house or out-houses belonging and used with the said
“ dwelling-house or houses, altho no person shall be in the
“ said house or houses at the time of the felony commit-
“ ted, every such person shall be excluded from the benefit
“ of clergy.

Upon this statute these things are observable :

1. That the indictment, whereupon such person is to be excluded of the benefit of his clergy, ought precisely to follow the statute, *viz.* it must be in the day-time, and no person being in the house, and must appear to be so upon evidence.

2. And therefore, if either the indictment pursue not the statute, or the evidence make not good the indictment, he is to have his clergy, and therefore upon such an indictment he may be acquitted of stealing against the form of the statute, and found guilty of simple felony at common law, tho the indictment conclude *contra formam statuti*; and the same law it is, if an indictment be formed upon the statute of 23 *H. 8.* or 5 & 6 *E. 6.* for tho the indictments in those cases be special, and conclude sometimes *contra formam statuti*, yet they include felony at common law, and tho the indictment concluding *contra formam statuti* be good, it is not necessary, so as the circumstances required by the statute be pursued, for the statutes in these cases make not the felony, but only exclude clergy, when the felony is so circumstantiated, as the statute mentions, and is so expressed in the indictment.

3. If the indictment be formed upon this statute, as that he broke and entred the house in the day-time, and stole, no person being in the house, if it appear upon the evidence, that the felony was committed without these circumstances, as if it were committed in the night, or not in the day, so that it is burglary, or if committed when some of the family were in the house, in which case he had been ousted of his clergy by the statute of 5 & 6 *E. 6.* if the indictment had been formed upon that statute, yet in such case the offender being specially indicted upon the statute of 39 *Eliz.* shall be

found guilty of simple felony at common law, and shall not be ousted of his clergy by the statutes of 23 H. 8. 1 E. 6. 5 & 6 E. 6. or 18 Eliz. cap. 7. because the indictment is not formed upon those statutes, but only upon 39 Eliz. and if the circumstances of the statute of 39 Eliz. upon which the indictment is formed, be not pursued in the evidence, he must have his clergy, and so is the constant practice.

4. Altho this statute of 39 Eliz. in the body of the act speaks only of stealing, yet in as much as the preamble speaks of robbery, it hath been always taken, that upon this statute, as well as upon the statute of 5 E. 6. there must these three things concur to oust clergy: 1. There must be an *actual stealing* or taking away of goods of some value upon the statute of 5 & 6 E. 6. and of goods to the value of five shillings upon this statute, but it is not necessary, that the goods be carried out of the house, for if he take them out of a trunk or cupboard, and lay them in the room, and be apprehended before he carry them away, it is a stealing within the statutes, and at common law also, as was resolved by all the judges, *uno dissentiente*, in a case out of *Cambridgeshire* upon a special verdict there found upon an indictment upon the statute of 5 & 6 E. 6. anno 1664. (i). 2. It must be a stealing of goods *in the house*, and therefore he that steals, or is party to the stealing them, being out of the house, is not by this statute to be ousted of his clergy. 3. Upon this statute, as well as upon the statute of 5 & 6 E. 6. there must be some act of force or *breaking*. (k)

Now what shall be said such a force, as must bring the party within this statute, hath been touched before, to which I add, 1. That whatsoever breaking will make a burglary, if it were in the night, will make such a force or breaking, as is within this statute and that of 5 E. 6. to oust the thief of his

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(i) This was *Simpson's* case mentioned below, and is reported *Kel.* 31.

(k) But now by 10 & 11 W. 3. cap. 23.
 " Whoever by night or day shall in any
 " shop, ware-house, coach-house or stable
 " privately and feloniously steal to the va-
 " lue of 5 s. or more, tho such shop be
 " not broke open, nor any person therein,
 " or shall assist, hire, or command any

" person to commit such offense, shall be
 " excluded from the benefit of clergy.
 " And by 12 Ann. cap. 7. " Whoever
 " shall feloniously steal to the value of
 " 40 s. in any dwelling-house or out-
 " house thereto belonging, altho it be
 " not broken, nor any person therein,
 " their aiders or assistants are excluded
 " from clergy.

his clergy, as if he break open the outward or inward door of the house, pick the lock of such door, draw the latch, break open the window, &c. 2. Some breaking or force will oust clergy upon the statutes of 5 & 6 E. 6. and 39 Eliz. which will not make a burglary, if it were in the night, as where he enters by the doors open, and breaks open a counter or cupboard fixed to the freehold, as was agreed in the *Cambridgeshire* case before-mentiond.

T. 16 Car. 2. *Simson's* case, where the case was thus: a man came into a dwelling-house, none being within, and the doors being open, and broke up a chest, and took out goods to the value of five shillings, laid them on the floor, and before he could carry them out of the chamber, he was apprehended, and upon this matter specially found he was ousted of his clergy upon the statute of 39 Eliz. for the taking of them out of the chest was felony by the common law, and the statute of 39 Eliz. did not alter the felony, but only excluded clergy; *per omnes justiciarios Angliæ. Ex libro Bridgman.*

But whereas in that case the breaking open of the chest was held such a force or breaking, as excludes clergy upon that statute, I have observed, that the constant practice at *Newgate* hath not allowed that construction, unless it was a counter or cupboard fixed; yet *note*, this resolution of 16 Car. was by all the judges of *England* then present, and tho one dissented, he after came about to the opinion of the rest. *Ideo quere.*

T. 13 Car. 1. B. R. *Evans* and *Finch* (1) were arraigned at *Newgate* upon an indictment, that they at twelve of the clock in the day *domum mansionalem Hugonis Audely de interiori templo, nullâ personâ in eadem domo existente, fregerunt, & 40 l.* from thence did steal, a special verdict was found, that *Evans* by a ladder climbed up to the upper window of the chamber of *H. Audely*, and took out of the same forty pounds, and *Finch* stood upon the ladder in view of *Evans*, and saw *Evans* in the chamber, and was assisting to the robbery, and took part of the money, and that at the time of the robbery divers persons were in the *Inner Temple-hall*, and in divers other parts

(1) *Cro. Car.* 473.

parts of the house; ruled, 1. That a chamber in an inn of court is *domus mansionalis* within the statute of 39 *Eliz.* of him, who was the owner of the chamber. 2. That altho this chamber was parcel of the *Inner Temple*, and other persons were in the hall and other parts of the *Inner Temple*, yet no person being in the chamber, this offense was within the statute of 39 *Eliz.* and so it differs from the case of *Whitehall* before-mentiond, where the indictment was upon the statute of 5 & 6 *E. 6.* 3. That in as much as *Evans* was only in the chamber, and *Finch* entred not the chamber, *Evans* had judgment of death, and *Finch* had his clergy.

And the like law had been upon the statute of 5 & 6 *E. 6.* as is before declared, for these statutes only exclude the parties, that actually take out of the dwelling-house, not those that are present and assenters (*m*), as hath been also before declared (*n*) upon the statute of 1 *Jac.* of stabbing.

And herein it differs from burglary and robbery, for therein all persons, that are present, aiding, and assisting, are equally burglars or robbers with him, that enters or actually takes; but of this hereafter.

But this statute of 39 *Eliz.* takes not away the benefit of clergy, where the offender stands mute, but only in the case of conviction by verdict, confession, or otherwise according to the laws of the realm; *quære* of outlawry, for there the party is attaind indeed, but not found guilty, for if he reverse the outlawry, he shall plead to the felony. (*o*)

And thus far for those larcinies, that relate to the dwelling-house of any wherein clergy is excluded.

V. The next statute, that excludes from clergy, is the statute of 1 *E. 6. cap. 12.* and 2 & 3 *E. 6. cap. 33.* which exclude clergy from any person convict by verdict or confession of stealing any horse, mare, or gelding, or wilfully standing mute.

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But

(*m*) But by 3 & 4 *W. & M. cap. 9.* clergy is taken away from all, who comfort, aid, abet, assist, counsel, hire, or command any person feloniously to break any dwelling-house, shop, or ware-house thereto belonging, and feloniously to take away any money, goods, &c. to the

value of 5 s. or upwards, altho no person be within the same.

(*n*) *Vide antea p. 468.*

(*o*) But now by 3 & 4 *W. & M. cap. 9.* clergy is expressly taken away in case of outlawry, or of standing mute, &c.

But it takes not away clergy from accessaries before or after.

VI. The statute of 8 *Eliz. cap. 4.* by which he that takes money or goods feloniously from the person of any other, privily, without his knowledge, is ousted of his clergy, if convicted by verdict or confession, or if he challenge above twenty peremptorily, or stands mute, or will not directly answer, or be outlawed.

Upon this statute these things are observable: 1. It doth not alter the nature of the felony, and therefore, if what he take away so be not above the value of twelve-pence, it is only petit larciny, as it was before, and so differs from the case of robbery, *Co. P. C. cap. 16. p. 58. Crompt. de Pace, fol. 33. b.* 2. The indictment must be pursuant to the statute, *viz. quod felonice &c. clam & secreta a personâ &c. cepit*, otherwise the offender hath his clergy. 3. It doth not oust accessaries of their clergy, nor it seems doth it oust any of his clergy but him, that actually picks the pocket, and not those that are present, aiding and assisting, upon the reason of *Evan's* case before, for it shall be taken literally.

By an act of this parliament, *viz. * * * (p)*

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CHAP.

(p) This was left unfinished by our author, but I suppose the statute here meant is 22 *Car. 2. cap. 5.* by which
“ All who shall feloniously steal woollen
“ manufactures from the tenters, or shall

“ embezzel the king's naval stores, are
“ excluded from clergy.

As to subsequent statutes, which take away clergy from larciny in dwelling-houses, *vide postea sub fine cap. 48.*

C H A P. XLV.

Concerning petit larciny.

Petit larciny is the felonious stealing of money or goods not above the value of twelve-pence without robbery, for altho that by some opinions the value of twelve-pence make grand larciny, 22 *Affiz.* 39. *per Thorp*, yet the law is settled; that it must exceed twelve-pence to make grand larciny. *West.* 1. *cap.* 15. (a). 8 *E.* 2. *Coron.* 404.

The judgment in case of petit larciny is not loss of life, but only to be whipt, or some such corporal punishment less than death, and yet it is felony, and upon the conviction thereof the offender loseth his goods, for the indictment runs *felonice*. 27 *H.* 8. 22.

A party indicted of petit larciny and acquitted, yet if it be found he fled for it, forfeits his goods, as in case of grand larciny. 8 *E.* 2. *Coron.* 406. *Stamf. P. C.* p. 184. a.

But in case of petit larciny there can be no accessaries neither before nor after. *P.* 9 *Fac.* 12 *Co. Rep.* 81.

If two or more be indicted of stealing goods above the value of twelve-pence, tho in law the felonies are several, yet it is grand larciny in both. 8 *E.* 2. *Coron.* 404.

But if upon the evidence it appears, that *A.* stole twelve-pence at one time, and *B.* twelve-pence at another time, so that the acts themselves were several at several times, tho they were the goods of the same person, this is petit larciny in each, and not grand larciny in either.

If *A.* be indicted of larciny of goods to the value of five shillings, yet the petit jury may upon the trial find it to be but of the value of twelve-pence, or under, and so petit larciny. 41 *E.* 3. *Coron.* 451. 18 *Affiz.* 14. *Stamf. P. C.* p. 24. b.

If *A.* steal goods of *B.* to the value of six-pence, and at another time to the value of eight-pence, so that all put together exceed the value of twelve-pence, tho none apart amount to twelve-pence, yet this is held grand larciny, if he be indicted of them altogether, *Stamf. P. C. p. 24.* collected from the book of 8 *E. 2. Coron. 415. Dalt. cap. 101. p. 259. (b)*

But if the goods be stolen at several times from several persons, and each a-part under value, as from *A.* four-pence, from *B.* six-pence, from *C.* ten-pence, these are several petit larcinies, and tho contained in the same indictment make not grand larciny.

But it seems to me, that if at the same time he steals goods of *A.* of the value of six-pence, goods of *B.* of the value of six-pence, and goods of *C.* of the value of six-pence, being perchance in one bundle, or upon a table, or in one shop, this is grand larciny, because it was one entire felony done at the same time, tho the persons had several properties, and therefore, if in one indictment, they make grand larciny.

If *A.* steal *clam & secretè* out of the pocket of *B.* twelve-pence, tho the statute of 8 *Eliz.* take away clergy from a pick-pocket; yet it is but petit larciny; *quod vide supra p. 529.*

And so if a man could possibly steal a horse of the value of twelve-pence only, or under, or break a house in the day-time, and steal goods only of the value of twelve-pence, the owner, his wife or children being in the house, and not put in fear, this will be but petit larciny notwithstanding the statute of 5 & 6 *E. 6.* take away clergy, for that statute altered not the nature of the offense, but takes away clergy, where clergy was before, namely where the offense was capital, as in case of grand larciny.

But if they were put in fear, then it would be robbery, how small soever the value were, and so could not sink into the nature of petit larciny; but of this in the next chapter.

CHAP.

C H A P. XLVI.

Of robbery.

Robbery is the felonious and violent taking of any money or goods from the person of another, putting him in fear, be the value thereof above or under one shilling.

In this case it is to be considered, 1. What is a felonious taking from the person. 2. Who shall be said a felonious taker from the person of a man. 3. What violence or putting in fear is requisite to make up robbery. 4. In what cases such a robber is admissible to his clergy.

As to the first.

1. There must be in case of robbery (as also in all cases of larciny) something feloniously taken, for altho antiently an assault to the intent to rob, or an attempt to rob was reputed felony, *voluntas reputabatur pro facto*, 25 E. 3. 42. 13 H. 4. 7. *per Gascoigne* 27 *Affiz.* 38. yet the law is held otherwise at this day (a), and for a long time since the time of Edward III. and therefore if A. lie in wait to rob B. and assault him to that purpose, and require him to deliver his purse, yet if *de facto* he hath taken nothing from him, this is not felony, but only a misdemeanor, for which he is punishable by fine and imprisonment. 9 E. 4. 26. *b.* *Stamf. P. C.* p. 27. *b.* *Co. P. C.* p. 68.

There is a double kind of taking, *viz.* a taking in law, and a taking in fact.

If thieves come to rob A. and finding little about him enforce him by menace of death to swear upon a book to fetch them a greater sum, which he doth accordingly, this is a taking by robbery, yet he was not in conscience bound by such compelled oath, for the fear continued, tho the oath bound him not; and in that case the indictment need not be special,

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(a) *Plowd. Com.* 259. *b.*

cial, for that evidence will maintain a general indictment of robbery, 44 E. 3. 14. b. 4 H. 4. 2. a. Co. P. C. p. 68. Dalt. cap. 100. p. 257. (b), who saith it was so adjudged also in P. 36 Eliz.

If *A.* assaults *B.* and bids him deliver his purse, and *B.* delivers it accordingly, this is a taking, and so it is if *B.* refuse, and then *A.* prays him to give or lend him money, which *B.* doth accordingly, this is robbery, for *B.* doth it under the same fear, Dalt. cap. 100. 44 Eliz. Cromp. 34. b. so it is if *B.* throw his purse or cloak in a bush, and *A.* takes it up and carries it away; so if *B.* flying from the thief lets fall his hat, and the thief take it and carry it away, for all is the effect of the same fear. Dalt. ubi supra.

So if *A.* without drawing his weapon requires *B.* to deliver his purse, who doth deliver it, and *A.* finding but two shillings in it gives it him again, this is a taking by robbery. 20 Eliz. Cromp. 34. Dalt. ubi supra.

If *A.* have his purse tied to his girdle, *B.* assaults him to rob him, and in struggling the girdle breaks, and the purse falls to the ground, this is no robbery, because no taking; but if *B.* take up the purse, or if *B.* had the purse in his hand, and then the girdle break, and striving lets the purse fall to the ground, and never takes it up again, this is a taking and robbery. Co. P. C. p. 69. Dalt. cap. 100. Cromp. fol. 35.

It is not always necessary, that in robbery there should be strictly a taking from the person, but it sufficeth if it be in his presence, as appears by some of the former instances, in case it be done with a putting in fear: as where a carrier drives his pack-horses, and the thief takes his horse, or cuts his pack, and takes away the goods; so if a thief come into the presence of *A.* and with violence, and putting *A.* in fear, drives away his horse, cattle, or sheep. Dalt. ubi supra. Stamf. P. C. p. 27. a.

II. Who shall be said a person robbing or taking.

If several persons come to rob a man, and they are all present, and one only actually take the money, this is robbery in all.

Pudsey and two others, viz. *A.* and *B.* assault *C.* to rob him in the highway, but *C.* escapes by flight, and as they were assaulting him *A.* rides from *Pudsey* and *B.* and assaults *D.* out of the view of *Pudsey* and *B.* and takes from him a dagger by robbery, and came back to *Pudsey* and *B.* and for this *Pudsey* was indicted and convict of robbery, tho he assented not to the robbery of *D.* neither was it done in his view, because they were all three assembled to commit a robbery, and this taking of the dagger was in the mean time. 28 *Eliz. B. R. Cromp.* 34.

And so it is if *A. B.* and *C.* come to commit a robbery, and *A.* stands centinel at the hedge-corner to watch if any come, and *B.* and *C.* commit the robbery, tho *A.* was not actually present, nor within view, but at a distance from them; and the like in burglary. 11 *H. 4. 13. Co. P. C. p. 64.*

III. What shall be said a putting in fear, or violent taking.

Without putting in fear or violence it is not robbery, but only larciny, and the indictment must run, *quod vi & armis apud B. in regiâ viâ ibidem &c. 40 s. in pecuniis numeratis felonice & violenter cepit a personâ*; and therefore if the word *violenter* be omitted in the indictment, or not proved upon the evidence, tho it were *in altâ viâ regiâ & felonice cepit à persona*, it is but larciny, and the offender shall have his clergy. *Dy. 224. b. H. 17 Jac. in B. R. (c).* *Harman* was indicted of the robbery of *Halfpenny* in the highway, and upon the evidence it appeared, that *Harman* was upon his horse, and required *Halfpenny* to open a gap for him to go out, *Halfpenny* going up the bank to open the gap, *Harman* came by him, and slipt his hand into his pocket, and took out his purse, *Halfpenny* not suspecting the taking of his purse, until turning his eye he saw it in *Harman's* hand, and then he demanded it, *Harman* answerd him, *Villain if thou speakest of thy purse, I will pluck thy house over thine ears, and drive thee out of the country, as I did John Somers*, and then went away with his purse, and because he took it not with such violence, as put *Halfpenny* in fear, it was ruled to be but stealth, and not robbery, for the words of menace were used after

the taking of the purse, wherefore he was found guilty only of larciny, and had his clergy. (*d*)

IV. As to the point of clergy in robbery.

The statute of 23 H. 8. cap. 1. (*e*), and 5 & 6 E. 6. cap. 9. do not oust robbery of clergy in all cases, but only in two, viz. when the robbery is committed in a mansion-house, the owner, his wife, children or servants being in the house and put in fear (*f*), or when committed in or near the highway.

And therefore *Trin.* 38 H. 8. *Moore*, n. 16. p. 5. A man indicted of robbery *in quâdam viâ regiâ pedestri ducent' de London ad Islington*, and accordingly found guilty, had his clergy, for the words of the statute are *for robbery in or near the highway he shall be ousted of his clergy*, and therefore the indictment and conviction must be of a robbery *in vel prope altam viam regiam*, and it is not sufficient to say only *viâ regiâ* or *viâ regiâ pedestri*.

For where any person is to be ousted of his clergy by virtue of any act of parliament, two things are always requisite, 1. That the indictment bring the fact within the statute, but need not conclude *contra formam statuti*.

2. That the evidence and finding of the jury likewise bring the case within the statute, otherwise the prisoner is to have his clergy.

But an indictment of a robbery *in vel prope altam viam regiam*, tho in the disjunctive is usual at *Newgate*, for if it be either in or near it, tho an indictment ought to be certain, yet this is not the substance of the indictment, nor that which makes the crime, but only to ascertain the court as to the point of clergy to serve the statute.

A rob-

(*d*) But it should seem; that this was a private stealing from the person of another, and therefore, if above the value of twelve-pence, would have been ousted of clergy by 8 *Eliz.* cap. 4. if the indictment had been laid pursuant to that statute.

(*e*) This statute, and that of 25 H. 8. cap. 3. ousts clergy only in cases of conviction, standing mute, not directly answering, or challenging peremptorily above the number of twenty, but does not extend to the case of an outlawry,

but this seems to be included in the word *attainted* in 1 E. 6. cap. 12. however it is expressly provided for by 3 & 4 W. & M. cap. 9.

(*f*) Being put in fear is necessary by the 23 H. 8. cap. 1. (and also by 1 E. 6. cap. 12. which perhaps is the statute intended by our author) but by 5 & 6 E. 6. cap. 9. all that is requisite is, that the owner, &c. be in the house, tho not put in fear, for the expression of that statute is, *the owner, &c. being in the house, whether sleeping or waking.*

A robbery is committed upon the *Thames* in a ship there lying at anchor below the bridge, on that side of the river, which is *Middlesex*, for this robbery *Hyde* and others were indicted as of a robbery done *in vel prope altam viam regiam*, and were ousted of their clergy, for the *Thames* is in truth *alta via regia* the king's high stream, and if it were not, yet it is not far off from it, and the statute says *near not next*.

By the statute of 25 *H. 8. cap. 3.* (g) clergy is ousted upon examination, if the original offense were committed in another county, and excluded from clergy by 23 *H. 8. cap. 1.* and that statute extends to robbery in a mansion-house, or in or near the highway.

A. robs *B.* on the highway in the county of *C.* of goods to the value only of twelve-pence, and carries them into the county of *D.* it is certain, that this is larciny in the county of *D.* as well as in the county of *C.* but it is only robbery in the county of *C.* where the first taking was, and for robbery he cannot be indicted or appeal'd in the county of *D.* but only in the county of *C.* but he may be indicted of larciny in the county of *D.* and it is certain, tho the robbery were but of the value of one penny, yet if *A.* were indicted thereof in the county of *C.* he should have had judgment of death, and been excluded from clergy.

Yet if *A.* be indicted of larciny in the county of *D.* and the jury find the value to be only twelve-pence, he shall only have the judgment of petit larciny, and not suffer death, as he should have done, if he had been indicted of robbery in the county of *C.* altho it appear upon examination upon the trial in the county of *D.* that it was a robbery; the like law is, if it had been a robbery in a dwelling-house within the statute of 23 *H. 8.* because it can be no more than petit larciny in the county of *D.* it being found but of the value of twelve-pence, and accordingly resolved by the opinion of all the justices, 31 *Eliz. Moore, n. 739. pag. 550.* for the statute of 25 *H. 8.* extended to oust them of clergy, where clergy is demandable, but the jury finding the value to be but twelve-pence, or un-

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der,

(g) This statute was in effect repeal'd by 1 *E. 6. cap. 12.* but is revived by 5 & 6 *E. 6. cap. 10.*

der, no clergy is demandable, because petit larciny, but the party is to be whipt only.

It hath been before observed, *cap.* 44. that upon the statute of 39 *Eliz. cap.* 15. tho *A.* and *B.* be both present and consenting to the breaking and entring of a house to rob, and *A.* only enters into the house, and *B.* stands by, *A.* shall be ousted of his clergy, but *B.* shall have his clergy (*b*), because *A.* only entred the house, and the words of the statute extend only to him, that actually enters the house, yet if *A.* and *B.* be present, and consenting to a robbery in or near the highway; or to a burglary, tho *A.* only actually commits the robbery, or actually breaks and enters the house, and *B.* perchance be watching at another place near, or be about a robbery hard by, which he effects not, yet they are both robbers or burglars, and both shall be ousted of their clergy, as in *Pudsey's* case, and the reason of the difference is, because in this case both are robbers and burglars, but in the former case both steal not in the house, but only *A.* and that statute binds up the exclusion of the clergy to stealing in the house.

Anno 1672. at *Newgate, Hyde* and *A. B. C.* and *D.* conclude to ride out to rob, and accordingly they rode out, but at *Hounslow D.* parted from the company, and rode away to *Colbrook, Hyde, A. B.* and *C.* rode towards *Egham*, and about three miles from *Hounslow, Hyde, A.* and *B.* assaulted a man, but before he was robbed *C.* seeing another man coming at a distance before the assault rode up to him about a bow-shot or more from the rest, intending either to rob him, or to prevent his coming to assist, and in his absence *Hyde, A.* and *B.* robbed the first man of divers silk stockings, and then rode back to *C.* and they all went to *London*, and there divided the spoil: it was ruled upon good advice, 1. That *D.* was not guilty of the robbery, tho he rode out with them upon the same design, because he left them at *Hounslow*, and fell not in with them, it may be he repented of the design, but at least he pursued it not. 2. That *C.* tho he was not actually

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(*b*) But now by the statute of 3 & 4 *W. & M. cap.* 9. taken away from all aiders, abettors, or assistants. he would not have his clergy, for by that statute clergy is

ally present at the robbery, nor, as I remember, at the assault, but rode back to secure his company, was guilty as well as *Hyde, A. and B.* and thereupon *C.* as well as *Hyde, A. and B.* had judgment of death, and was excluded of clergy, the indictment being for robbery on the highway, according to the resolution in *Pudsey's* case, for they were all robbers on the highway.

C H A P. XLVII.

Concerning restitution of goods stolen, and the confiscation of goods omitted in the indictment or appeal.

ALtho this title may seem to come more properly to be examined, when we come to consider of the proceedings and judgment in criminal causes, yet in as much as it properly relates to larciny and robbery of goods, it will not be amiss to take it up here as an appendix to the four former chapters touching larciny and robbery.

There are three means of restitution of goods for the party, from whom they were stolen, *viz.* 1. By appeal of robbery or larciny. 2. By the statute of 21 H. 8. cap. 11. And 3. By course of common law.

I. Upon an appeal of robbery or larciny, if the party were convict thereupon, restitution of the goods contained in the appeal was to be made to the appellant, for it is one of the ends of that suit.

And hence it is, that if in an appeal of felony or robbery the appellant omit any of the goods stolen from him, they are forfeit, and confiscate to the king. 45 E. 3. *Coron.* 100.

And so it is, if he bring an appeal of robbery or larciny; and it appear upon the trial, that indeed the goods were the plaintiff's, but yet the appellee came to the goods not by felony, but by finding or bailment or the like without felony; the plaintiff forfeits these goods to the king for his false appeal. 3 E. 3. *Coron.* 367.

But if the defendant in the appeal be convicted, he shall not only have judgment of death, but the plaintiff shall have a restitution of his goods.

If *A.* steal the goods of *B. C.* and *D.* severally, and *B.* brings his appeal, and convicts the offender, yet before judgment *C.* and *D.* may pursue their appeals, and he shall be arraigned also upon their several appeals. 4 E. 4. 11. *a.*

So if judgment be given against *A.* upon the appeal of *B.* yet if the appeal of *C.* were begun before the attainder, *A.* shall be arraigned upon the appeal of *C.* because he is to have restitution of his goods thereby, yet by the book of 7 H. 4. 31. and 12 E. 2. *Coron.* 379. it seems, that the second trial at the suit of *C.* is but in nature of an inquest of office to entitle him to the restitution of his goods, because as to the judgment of life he is already in law a dead person, and the book of 4 E. 4. 11. (*a*) speaks not in case of a judgment, but only of a conviction or finding guilty; *quære, vide* 44 E. 3. 44. yet *vide Stamf. p.* 66 and 107. it seems the attainder is no bar to *C.*

But certain it is, that if *A.* be attaint at the suit of *B.* and then and not before *C.* commence his appeal, *A.* shall not be arraigned thereupon, but if he be afterwards pardoned, then he shall be arraigned at the suit of *C.* commenced after the attainder, 6 H. 4. 6. *b.* 10 H. 4. *Coron.* 227. But if the attainder were at the king's suit for that very felony, for which *C.* brought his appeal after the attainder, then it seems he shall not be put to answer it. *Stamf. P. C. p.* 106.

Now touching restitutions upon appeals, *Stamf. Lib. III. cap. 10. fol. 165.* hath given us a full account, I shall follow his method partly and summarily. 1. Where the plaintiff shall have restitution. 2. When. 3. Of what things.

1. As

(*a*) That case was of a second appeal brought before the party had pleaded to the first.

1. As to the *first*, where and in what cases the party appellant shall have restitution.

1. It must be upon fresh suit, and tho' antiently the law was strict herein as to the time and manner of the pursuit and apprehending of the felon, yet the law is now more liberal.

If the felon be taken by any others, as by the sheriff, yet if the party robbed come within a year after, and give notice of the felony, and enter his appeal, this is a fresh suit, if he used his diligence shortly after the felony to have taken him. 7 H. 4. 43. b.

2. The appellant must proceed with his appeal to convict the felon; but yet in cases of impossibility of such conviction it is sufficient that he used his endeavour; as if he take the felon, and imprison him, and he dies within the year, and before the appeal commenced; so if the party abjure or break prison after he is taken, 12 E. 2. *Coron.* 380. so as the appeal be commenced within the year and day, and that he made fresh suit, 26 *Affiz.* 32. or if he challenge peremptorily above the number appointed by law, stands mute of malice, or hath his clergy (b), 8 H. 4. 1. or be outlawed.

2. As to the *second*, when he shall have restitution.

He shall have restitution after judgment against the appellee, and before execution made or prayed. 21 E. 4. 73. b.

He shall have restitution after conviction of the principal, and before conviction of the accessory, and after conviction of one of the principals before conviction of the other, or tho' the other be acquitted upon his appeal. 21 E. 4. 16. a. 10 H. 4. *Coron.* 466.

But if A. steal severally the goods of B. and C. and he be convicted upon the appeal of B. yet C. shall not have restitution till he be convicted at his suit also, 4 E. 4. 11. *supra.* altho' the felon be convicted at the suit of the appellant, yet he is not to have restitution till the fresh suit be inquired, which is to be done by the same jury, that convicts the felon, if he plead to inquest, but if he confess the felony, or stand mute,

it shall be inquired by inquest taken *ex officio* by the judge.

1 H. 4. 5. a. 2 R. 3. 12. 3 H. 7. 12. b.

3. Of what things he is to have restitution.

If a felon waive the goods stolen without any pursuit after him, those goods are not in law *bona waiviata*, nor forfeit to the king or lord of a franchise; but if he waive them upon a pursuit of him, then they are *bona waiviata*, and forfeit to the king or lord of the liberty; *quod vide* 5 Co. Rep. 109. a. *Foxley's case*.

And this forfeiture is not like a stray, where tho the lord may seize, yet the party, who is the owner, may retake them within the year and day, but here the true owner cannot seize his own goods, tho upon fresh suit within the year and day.

2 E. 3. 11. a. *Avowry* 151. 3 E. 3. *Cor.* 162.

But yet this is not an absolute loss of the owner's goods, but rather an expedient settled by law to drive the owner to convict the felon by prosecuting his appeal, and therefore if he make fresh suit, and prosecute his appeal, and the felon be thereupon convict or attaint, and the fresh suit be inquired and found by verdict or inquest of office, he shall have restitution of the goods so waived. 5 Co. Rep. 109. *Foxley's case*, 3 E. 3. *Coron.* 162.

But more of restitution under the next general, for it is regularly true, that of what things the owner shall have restitution upon the statute of 21 H. 2. he should have restitution upon a conviction in an appeal at common law, and *è converso*, so that what is said upon that statute, is applicable to restitution upon an appeal.

II. By the statute of 21 H. 2. *cap.* 11. it is enacted, “ That
“ if any person do rob or take away the goods of any of
“ the king's subjects within this realm, and be indicted, ar-
“ raigned, and found guilty thereof, or otherwise attainted
“ by reason of the evidence of the party so robbed, or owner
“ of the said money, goods or chattels, or any other by their
“ procurement, that then the party so robbed, or owner,
“ shall be restored to his money, goods or chattels, and the
“ justices, before whom such person shall be so attainted, or
“ found guilty by reason of the evidence of the party so
“ robbed

“ robbed, or owner, or by any other by their procurement,
 “ have power to award writs of restitution for the said mo-
 “ ney or goods, or chattels in like manner, as tho any such
 “ felon or felons were attainted at the suit of the party in an
 “ appeal.

This statute introduced a new law for restitution, for before this statute there was no restitution upon an indictment, but only upon an appeal. 22 E. 3. *Coron.* 460. *Stamf. P. C.* p. 167. a.

Tho the statute speak of the king's subjects, it extends to aliens robbed, for tho they are not the king's natural-born subjects, they are the king's subjects, when in *England*, by a local alligance.

If the servant be robbed of the master's money, and the master, or his servant by his procurement give evidence and convict the felon, the master shall have a writ of restitution, if it appear upon the indictment and evidence, it was the master's money, for the statute gives restitution to the party robbed or owner. *Stamf. P. C.* p. 167.

If *A.* be robbed by *B.* and *C.* and *B.* only is convict of the robbery by the evidence of *A.* he shall have restitution, for so he should have had in case of an appeal.

If *A.* be robbed of an ox by *B.* who sells him to *C.* who keeps the money in his hands, and after kills the ox, and sells the flesh, or if the money be seized in the hands of the thief, *A.* may, if he please, have a writ of restitution for the money. *Noy's reports, Harris's case.* (c)

So if money be stolen, and the thief taken, and the money seized, he shall have restitution of the money.

The testator is robbed, the thief is convict upon the procurement of the executor, he shall have restitution. 3 *Eliz. Benl.* 87. *Dy.* 201. 6 *Co. Rep.* 80.

It hath been a great question, if goods be stolen, and by the thief sold in a market-overt, whether the thief being convicted upon the evidence of the party robbed, he shall have restitution upon this statute of the thing sold or not, the buyer not being privy to the felony: those that held he should

should not, ground themselves upon the book of 12 H. 8. 10. Mr. Dalton's opinion, *cap.* 111. *p.* 299. (*d*) upon the resolution in the case of *market-overt*, 5 Co. Rep. 83. *b.* which was upon occasion of a writ of restitution (*e*), where it is held, that the sale in market-overt is a bar to the restitution, and upon the statute of 31 Eliz. *cap.* 12. where it is specially provided, that notwithstanding a sale of a horse in market-overt the owner may take him within six months after the felony upon proof of his property, which evidenceth, that after the six months he shall not have restitution; and of this opinion was Hyde justice (*f*) at the sessions held after Trin. 13 Car. Brown justice *dissentiente*.

But it seems he shall have restitution upon this statute, notwithstanding the sale in market-overt of the goods stolen, and as to the authorities, the 12 H. 8. 10. was before the statute of 21 H. 8. and Mr. Dalton's opinion seems to be grounded upon it; the case of *market-overt*, 5 Co. Rep. it is true seems to be against the restitution, tho the case fell off upon this, that the scrivener's shop was no market-overt by the custom of London.

As to the statute of 31 Eliz. to which I may add also the statute of 1 Jac. *cap.* 21. that enacts, "No sale of stolen goods
" in London, Westminster or Southwark, or within two miles to
" a broker, shall make any change or alteration of the pro-
" perty or interest:" These statutes make nothing as to the case in question, for without question the sale in market-overt changeth the property in those cases, wherein these and the like statutes have not enacted the contrary, and therefore the party cannot take them again from the buyer, unless in case of brokers, and stolen horses, *ut supra*: but this comes not to the question in hand, for here the act of parliament gives the restitution, and that only, where the felon is convicted; and this restitution is not prevented by the sale in market-overt. 1. This act was made to encourage persons robbed to pursue malefactors, and therefore they have an assurance of restitution, and it would be small encouragement
if

(*d*) *New Edit. cap.* 104. *p.* 543.

(*e*) 1 *And.* 544.

(*f*) *Kel.* 354.

if a thief by sale in market-overt, which is every day in almost every shop in *London*, should elude it.

2. It were against the common good, and would encourage offenders to the common detriment, if this sale should conclude the owner.

3. The man, that is robbed, is robbed against his will, and cannot help it, but the buyer of stolen goods may chuse, whether he will buy, or if he buy, may yet refuse to buy, unless well secured of the property of the goods, or knowing the owner.

And if it be said, that the restitution shall be, as in case of an appeal, and a sale in market-overt had barred a restitution in an appeal.

I answer, 1. That it is but *gratis dictum*, that a sale in a market-overt had barred restitution in appeal, for there is no authority for it, but the only book, that I know in the case, is to the contrary, *viz.* 2 *Co. Instit.* p. 714. If *A.* commits a robbery, the king's officer seizeth the goods stolen, and sells them in market-overt, the party robbed convicteth *A.* upon his appeal, he shall have restitution notwithstanding such sale, if he made fresh suit. 2. But suppose the appellant should not have restitution, yet that restrains not restitution in case of the statute of 21 *H. 8.* for the words *As though he had been attaint in appeal* are not restrictive, but relative only to the manner of the writ of restitution, which shall be such as in an appeal.

For authorities, 1. It hath been the constant practice at *Newgate*, that sale in market-overt hath not been allowed against this writ of restitution, and this *Mr. Lee*, the secondary there for above thirty years, hath attested openly in the court there oftentimes before myself, and divers others (*g*): again, 2 *Co. Inst.* p. 714. lord *Coke's* opinion was in these words, *So that in this case also, (viz. upon the statute of 21 H. 8. cap. 11.) the party robbed, or owner, shall have restitution notwithstanding any sale in market-overt,* and with this agreed myself and justice *Twisden* upon consideration of this statute.

1

Upon

Upon this statute of 21 H. 8. if the offender be convicted upon the evidence of the party robbed, or owner, he shall have restitution, tho there were no fresh suit, or any inquiry by inquest touching the same, and this is constant practice, tho in case of an appeal it be otherwise.

If *A.* be robbed by *B.* of a silver cup, a piece of cloth, and other things, and *A.* prefers an indictment only for one of them, as namely the cloth, and convict the felon, he shall have restitution of no more than what is contained in the indictment, and the goods omitted are confiscate to the king, as in case of goods omitted in an appeal, 44 E. 3. 44. (b) *tamen quere*, for it is not really the party's suit. *Vide Dalt. cap.* 111. p. 298. (i)

If *A.* have his goods stolen by *B.* and *A.* prefers a bill of indictment, which is found, whereupon *B.* flies and is outlawed, *A.* shall have restitution, for he gave evidence upon the indictment, which, tho it be not a conviction, is the ground of the outlawry, which is an attainder. *Dalt. ubi supra.*

A. and *B.* have their several goods stolen by *C.* *A.* prefers his bill of indictment for his goods, *C.* is thereupon convicted, notwithstanding that conviction *B.* may prefer his bill, and *C.* shall be thereupon arraigned and tried to the end that *B.* may have his restitution, which he could not have by the conviction upon the indictment of *A.* because a distinct felony, tho most usually at the same sessions the several indictments against the same person are tried by the same jury: *vide* 4 E. 4. 11. *Stamf. P. C. fol.* 167. b.

But suppose that *C.* be attaint on the indictment preferred by *A.* and reprieved till another sessions, and then *B.* prefer a bill of indictment for another robbery upon him by *C.* in this case *C.* may plead to the country if he please, and upon conviction *B.* shall have restitution, for the court is not bound to take notice at another sessions, that he is attaint, but he may if he please plead *autrefois attaint*, and refuse to answer, and then by the book of 44 E. 3. 44. in case of an appeal he should have no restitution, but his goods should be confiscate

6 Z

confiscate

(b) This is more directly proved *Corone* 100.

(i) *New Edit. ubi supra.*

ificate to the king, but I think that to serve the statute of 21 H. 8. as to the point of restitution the court may and in reason ought to inquire by an inquest of office touching the robbery of *B.* and being ascertained of it thereby to grant restitution, tho they ought to give no new judgment of death upon such inquest, at least, unless the prisoner had pleaded to the indictment not guilty, and put himself upon the country: *vide* 4 E. 4. 11. *Dalt. cap.* 111. p. 714, 715. (k), *Stamf. P. C.* p. 107.

And thus far of restitution by the statute of 21 H. 8.

III. Restitution by course of law is either by taking his goods, or by action.

1. As to retaking of goods stolen: if *A.* steal the goods of *B.* and *B.* take his goods of *A.* again to the intent to favour him or maintain him, this is unlawful and punishable by fine and imprisonment (l), but if he take them again without any such intent, it is no offense, *Mich.* 16 *Jac.* B. R. *Higgins* and *Andrews* (m), but justifiable.

But after the felon is convicted, it can be no colour of crime to take his goods again, where he finds them, because he hath pursued the law upon him, and may have his writ of restitution, if he please.

2. By course of common law: *A.* steals the goods of *B.* viz. fifty pounds in money, *A.* is convicted, and hath his clergy upon the prosecution of *B.* *B.* brings a *trover* and conversion for this fifty pounds, and upon not guilty pleaded this special matter is found, and adjudged for the plaintiff, because now the party hath prosecuted the law against him, and no mischief to the common-wealth; but it was held, that if a man feloniously steal goods, and before prosecution by indictment the party robbed brings *trover*, it lies not, for so felonies should be healed. *M.* 1652. B. R. *Dawkes* and *Coveneigh* (n); *vide accordant* *Noy's* reports (o), *Markham* and *Cob*, but if the
plaintiff

(k) *New Edit. cap.* 164. p. 543.

(l) And so seems the practice of advertising a reward for bringing goods stolen, and no questions asked, which I have heard lord chancellor *Macclesfield* declare to be highly criminal, as being a sort of compounding of felony, for the goods by that means returning to the right owner,

a stop is put to the inquiry and prosecution of the felon, and thereby great encouragement is given to the commission of such offenses. See *postea cap.* 56.

(m) 2 *Roll. Rep.* 55.

(n) *Style* 346.

(o) *Noy* 82.

plaintiff had not given evidence upon the conviction, it was held, that the action lay not, but the goods were confiscate to the king, and for want of that averment in the case of *Markham* judgment was given for the defendant in trespass.

C H A P. XLVIII.

Of burglary, the kinds, and punishment.

I Come to those crimes, that specially concern the habitation of a man, to which the laws of this kingdom have a special respect, because every man by the law hath a special protection in reference to his house and dwelling. (a)

And that is the reason, that a man may assemble people together for the safeguard of his house, which he could not do in relation to travel, or a journey. 21 H. 7. 39. a.

And upon the same reason it is, that not only by the statute of 24 H. 8. cap. 5. but even by the common law, if any come to commit a felony upon me in my house, and I kill him, it is no felony, nor induceth any forfeiture; *quod vide supra p. 487. vide Sir Henry Spelman Gloss. tit. Hamsecken, & ibidem tit. Burglaria*, whereby it appears, that by the antient laws of *Canutus* (b), and of H. 1. (c), it was punished with death.

The common genus of offenses, that comes under the name of *Hamsecken*, is that which is usually called house-breaking, which sometimes comes under the common appellation of *burglary*, whether committed in the day or night

to

(a) That this was the notion among the Romans also appears from Cicero in oratione pro domo, cap. 41. *Quid enim sanctius, quid omni religione munitius, quam domus uniuscujusque civium? hic aræ sunt, hic foci, ——— hoc persu-*

gium est ita sanctum omnibus, ut inde abripi neminem fas sit.

(b) l. 61. reckons *irruptio in domum* among the *scelera inexpiabilia*.

(c) l. 80. See *Wilk. Leg. Anglo-Sax.* p. 275.

to the intent to commit felony, so that house-breaking of this kind is of two natures.

1. That which in a vulgar and improper acceptation is sometimes called burglary, and

2. That which in a strict and legal acceptation is so called.

I. As to the former of these, *hamsecken*, house-breaking, or burglary in a vulgar acceptation is of several kinds.

1. Robbing of any person by day or night in his dwelling-house, the dweller, his wife, children or servants being in the house, and put in fear; this requires that there be some thing taken, but it requires not an actual breach of the house, but it is all one, whether he actually breaks the house, or enters *per ostia aperta*, for it is in truth robbery either way, and from this offense clergy is taken away by the statute of 23 *H. 8. cap. 1.* and 25 *H. 8. cap. 3.* from the principal, and by the statute of 4 & 5 *P. & M. cap. 4.* from the accessory.

2. Robbing a person by day or night in his dwelling-house, the dweller, his wife or children being in the house and not put in fear; this requires, 1. An actual breaking of the house. 2. An actual taking of something, but the persons need not be put in fear, and by the statute of 5 & 6 *E. 6. cap. 9.* clergy is in this case taken from the principal, that enters the house, and by the statute of 4 & 5 *P. & M. cap. 4.* from the accessory before.

3. Robbing a dwelling-house by day or night, and taking away goods, none being in the house; this requires an actual breaking, and an actual taking of something, and without the latter it is not felony, but if accompanied with both, and the taking of goods be of the value of five shillings, it is excluded from clergy by 39 *Eliz. cap. 15.*

4. A breaking of the house in the day or night to the intent to steal or commit a felony, any person being in the house and put in fear, tho nothing be actually taken; this is burglary by the common law, if it is in the night, and felony by the statute of 1 *E. 6. cap. 12.* tho in the day, and is excluded from clergy by the statute of 1 *E. 6.* whether by day or by night, but then it requires, 1. An actual breaking of the house, and not an entry *per ostia aperta.* 2. An entry with

intent to commit a felony, and so laid in the indictment. *Poulter's case*, 11 *Co. Rep.* 31. *b.*

3. A putting in fear, but accessaries have clergy.

II. Legal or proper burglary is of two kinds, *viz.* 1. Complicated and mixed with another felony, as breaking the house; and stealing goods, either with putting in fear or without putting in fear, somebody in the house, or nobody in the house, which requires, 1. That it be done in the night. 2. That there be an actual breaking.

2. Simple burglary, and that either, 1. With putting in fear, and then the principal is excluded of clergy by the statute of 1 E. 6. and also by the statute of 18 *Eliz.* or 2. Without putting in fear, and then he is excluded of clergy by the statute of 18 *Eliz.*

And this chapter speaks only of proper or legal burglaries; of those improper burglaries I have spoken before.

Burglary is described by Sir *Henry Spelman* (e) to be *nocturna diruptio alicujus habitaculi vel ecclesie, etiam murorum portarumve civitatis aut burgi ad feloniam perpetranda.*

My lord *Coke* *P. C. cap.* 14. *p.* 63. more fully describes it.

“ A burglar is he, that in the night-time breaketh and entereth into a mansion-house of another of intent to kill
 “ some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not.

And accordingly the indictment runs, *quod J. S. 1 die Julii anno U^{c.} in nocte ejusdem diei vi & armis domum mansionalem A. B. felonice & burglariter fregit & intravit, ac ad tunc & ibidem unum scyphum argenteum &c. de bonis & catallis ejusdem A. B. in eadem domo invent' felonice & burglariter furatus fuit, cepit & asportavit*; or if no theft were actually committed, then *ex intentione ad bona & catalla ejusdem A. B. in eadem domo existent' felonice & burglariter furandum, capiendum & asportandum*, or *ca' intentione ad ipsum A. B. ibidem felonice interficiendum contra pacem &c.*

And note, that these several clauses in the indictment are essential to the constitution of burglary, 1. That it be said *noctanter*, or in *nocte ejusdem diei* (f), for if it be in the day-

7 A

time,

(e) *in verbo* burglaria.

(f) See 9 *Co.* 66. *b.*

time, it is not burglary. 2. That it be said in the indictment *burglariter*, for it is a legal word of art, without which burglary cannot be expressed with any kind of other word or other circumlocution, and therefore, where the indictment is *burgaliter* instead of *burglariter*, it makes no indictment of burglary, so if it be *burgenter*. 4 Co. Rep. 39. b. (g)

3. It must be *fregit & intravit*, for it is held, that breaking without entering, or entering without breaking makes not burglary, *sed de hoc infra*; yet Trin. 5 Jac. B. R. an indictment, *quod felonice & burglariter fregit domum mansionalem, &c.* was a good indictment of burglary, and that the entry is sufficiently implied, even in an indictment, by the words *burglariter fregit*, but the safest and common way is to say *fregit & intravit*.

4. It must be said *domum mansionalem*, where burglary is committed in a house, and not generally *domum*, for that is too uncertain, and at large.

5. It must be alleged, that he committed a felony in the same house, or that he brake and entred the house to the intent to commit a felony, but these things will be fuller examined, when we come to particulars.

1. Therefore the time, wherein it must be committed to make it burglary, must be in the night.

It hath been antiently held, that after sun-set, tho day-light be not quite gone, or before sun-rising is *noctanter* to make a burglary, *Dalt. cap. 99. p. 352. (b)*, and accordingly cited by *Crompt. fol. 32. b.* to have been judged by *Portman, 3 E. 6. (i)*, and the felons executed, and 21 H. 7. *Kelw. 75. a.*

But the latter opinion hath been and still obtaineth, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun or *crepusculum*, it is not night, nor *noctanter* to make a burglary, and with this agrees *Co. P. C. p. 63.* and hence it is, that altho a town unwall'd shall not be amerced for the escape of a murderer, if the murder were committed in the night, yet if it were done only *in vespere diei*, the township shall be amerced. 3 E. 3.

(g) See also 5 Co. 121. b.

(b) *New Edit. cap. 151. p. 486.*(i) See the like judgment *per Fineux, Crompt. 33. a.*

Coron. 293. And if a robbery be committed before sun-rising; or after sun-set, and whilst it is so far day-light, that the countenance of a man can be reasonably discerned by the light of the day, yet the hundred shall be charged, otherwise where it is done in the night, 7 *Co. Rép.* 34. *Milburn's* case: but this is not intended of moon-light, for then midnight house-breaking should be no burglary; and the word *noctanter* is to be applied to all that follows, *viz. fregit & intravit*, if the breaking of the house were in the day-time, and the entering in the night, or the breaking in the night, and entering in the day, this will not be burglary, for both make the offense, and both must be *noctanter*: *vide Cromp.* 33. *a. ex 8 E. 2.* (k)

But if they break a hole in the house one night to the intent to enter another night and commit felony, and accordingly they come at another night, and commit a felony through the hole they so made the night before, this seems to be burglary, for the breaking and entering were both *noctanter*, tho not the same night; and it shall be supposed, that they brake and entred the night when they entred, for the breaking makes not the burglary till the entry.

2. There must be a breaking and an entry to make the burglary, and therefore I shall speak of them both together.

Antiently the law was so strict against burglary, that the very coming to a house with intent to commit a burglary was held punishable with death, *Cromp.* 31. by Sir *Anthony Brown*; but that obtains not now for law without a burglary committed.

Fregit, there is a double kind of breaking, 1. In law, and thus every one, that enters into another's house against his will, or to commit a felony, tho the doors be open, doth in law break the house. 2. There is a breaking in fact an actual force upon the house, as by opening a door, breaking a window, &c.

And altho, in the remembrance of some yet alive, Sir *N. H.* (l) chief justice did hold, that a breaking in law was sufficient to make a burglary, as if a man entred into the
house

(k) This case does not fully prove the point it is brought for, for the resolution there was only, that if thieves enter in by night at an hole in the wall, which

was there before, it is not burglary, but it does not appear who made the hole.

(l) Sir *Nicholas Hide*, see *Cro. Car.* 65, 225.

house by the doors open in the night, and stole goods, that this is burglary, and accordingly is *Crompt. 32. a. 27 Affiz. 38.* yet the law is, that a bare breaking in law, *viz.* an entry by the doors or windows open is not sufficient to make burglary without an actual breaking, *Co. P. C. p. 64.* and so the law hath been generally taken to this day in case of burglary. (*m*)

And these acts amount to an actual breaking, *viz.* opening the casement, or breaking the glass window, picking open a lock of a door with a false key, or putting back the lock with a knife or dagger, unlatching the door that is only latched, to put back the leaf of a window with a dagger, *Dalt. cap. 99. (n).* *Crompt. 33. a.* and so is common experience.

To take down a pane of glass of a glass-window by taking out or bending aside the nails that fasten it is a breaking of a house within this law, because the glass-window is parcel of the house.

It was held by *Manwood* chief baron, that if a thief goes down a chimney to steal, this is a breaking and entering, *Crompt. fol. 32. b.* and hereunto agrees *Mr. Dalton, p. 253. (o)*

There was one arraigned before me at *Cambridge* for burglary, and upon the evidence it appeared, that he crept down a chimney; I was doubtful, whether this were burglary, and so were some others, but upon examination it appeared, that in his creeping down some of the bricks of the chimney were loosened, and fell down in the room, which put it out of question, and direction was given to find it burglary; but the jury acquitted him of the whole fact.

In some cases there may be a burglary committed by a man without an actual breaking.

Thieves come with a pretended hue and cry, and require the constable to go along with them to search for felons, and whilst he goes with them into a man's house, they bind the constable and dweller, and rob him, this is burglary (*p*), *Co. P. C. p. 64.* The like happened in *Black Fryars 1664.* where thieves

(*m*) See *Kel. 67 & 70.*

(*n*) *New Edit. p. 487.*

(*o*) The reason of this seems to be, because it is as much shut, as the nature of the thing will admit.

(*p*) Because *in fraudem legis*; for the

same reason it is burglary, where the thieves gain entrance by pretenses of business with one in the house, *Kel. 42.* or of executing any process, or the like, *Kel. 43, 44, 62, 82.*

thieves pretending that *A.* harboured traitors called the constable to go with them to apprehend him, and the constable entering they bound the constable, and robbed *A.* and were executed for burglary, and yet in both cases the owner opened the doors of his own accord, at the command of the constable. *Crompt.* 32. *b.*

Thieves come in the night to rob *A.* who perceiving it opens his door, and issues out and strikes one of the thieves with a staff, another thief having a pistol in his hand, perceiving others in the entry ready to interrupt them, puts his pistol within the door over the threshold, and shot, so that his hand was over the threshold, but neither his foot, nor the rest of his body, and upon this evidence by great advice it was adjudged burglary, and the thief hanged, and yet he brake not the house. 26 *Eliz.* *Crompt.* 32. *a.*

If *A.* the servant of *B.* conspire with *C.* to let him in to rob *B.* and accordingly *A.* in the night-time opens the door or window, and lets him in, this is burglary in *C.* but larciny in *A.* the servant, *Dalt. cap.* 99. *p.* 253. (*q*). it seems it is burglary in both, for if it be burglary in *C.* it must needs be so in *A.* because he is present, and aiding to *C.* to commit this burglary.

If *A.* enter the house of *B.* in the night-time, the outward doors being open, or by an open window, and when he is within the house turns a key of a door of a chamber, or unlatcheth a chamber door to the intent to steal, this is burglary, tho the outward door were open, and so it was adjudged upon a special verdict before me at the sessions at *Newgate* 1672. by advice of many judges then also present.

And so it is if a thief be lodged in an inn, and in the night he stealeth goods; and goeth away, or if he enter into the house secretly in the day-time, and there stayeth till night, and then steals goods and goes away, this is not burglary, *Dalt. ubi supra p.* 253. and *Crompt.* 34. *a.* but if in either of the cases they had opened an inner chamber door and took the goods, it had been burglary, agreed 1672. (*r*)

The servant lies in one part of the house, the master in another, and the stair-foot door of the master's chamber is latched, the servant came in the night, and unlatched the stair-foot door, and went up into his master's chamber with a hatchet intending to kill him, and wounded him dangerously, but the master escaped (f). Upon this special matter found at *Winchester* assizes, by the advice of the greater number of the judges, *exceptis paucis* (t), it was adjudged burglary, and the offender was executed. *T. 16 Jac. Hutt. Rep.* the case of *Haydon* and *Edmunds.* (u)

If a man enter in the night-time by the doors open, with the intent to steal, and is pursued, whereby he opens another door to make his escape, this I think is not burglary against the opinion of *Dalt. p. 253.* (x) out of *Sir Francis Bacon*, for *fregit & exiit, non fregit & intravit.* (y)

If *A.* be a lodger in an inn, and he goes up to his chamber to bed, and the chamberlain pulls to the door and latcheth it, or *A.* himself locks it, and in the night he riseth, openeth his chamber door, steals goods in the house, and goes away, it may be a question, whether this be burglary; it seems not, because he had a kind of special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house, for *A.* hath a special property in his chamber, but if he had opened the chamber of *B.* a lodger in the inn to steal his goods, this had been burglary.

And in that case of a lodger, tho he hath a special interest in the chamber, yet he being but a lodger, and in an inn, the burglary must be supposed of the mansion-house of the inn-keeper (z): *vide plus infra.*

If *A.* enter into the house of *B.* in the night, by the doors open, and breaks open a chest, and takes away goods without breaking open of an inner door, this is no burglary, because the chest is no part of the house. (a) But

(f) In old times this would have been adjudged petit treason, for antiently where the intent was so apparent *voluntas reputabatur pro facto.* *Coron.* 383.

(t) They all concurred, except *Winch.* who doubted.

(u) *Hutt.* 20. *Kel.* 67.

(x) *New Edit.* p. 487.

(y) But now this doubt is settled by *12 Ann. cap. 7.* whereby breaking to get out is put upon the same foot with breaking to get in.

(z) *Kel.* 83.

(a) *Kel.* 69. But it is a felony, for which the offender is ousted of his clergy, by *3 & 4 W. & M. cap. 9.*

But if he break open a study or counting-house, or shop within the house, this is burglary, tho none usually lodge in the study, and the same law seems to be, if he break open a cupboard or counter fixed to the house (*b*); *quere.*

3. *Fregit & intravit.* There must be an entry as well as a breaking, and both must be in the night and with an intent to steal, otherwise it is no burglary.

A. intending to rob *B.* breaks a hole in his house, but enters not, *B.* for fear throws out his money to him, *A.* takes it and carries it away, this is certainly robbery, and some have held it burglary, tho *A.* never entred the house; and so it is reported to have been adjudged by *Saunders* chief baron. *Crompt.* 31. *b. tamen quere. (c)*

If *A.* breaks the house of *B.* in the night-time, with intent to steal goods, and breaks the window, and puts in his hand, or puts in a hook, or other engine to reach out goods, or puts a pistol in at the window with an intent to kill, tho his hand be not within the window, this is burglary. *Co. P. C. p. 64.*

But if he shoot without the window, and the bullet comes in, this seems to be no entry to make burglary; *quere.*

A. B. and *C.* come in the night by consent to break and enter the house of *D.* to commit a felony, *A.* only actually breaks and enters the house, and *B.* stands near the door, but actually enters not, *C.* stands at the lane's end, or orchard gate or field gate, or the like, to watch that no help come to aid the owner or dweller, or to give notice to the others, if help comes, this is burglary in them all, tho *A.* only actually brake and entred the house, and they all in law are principals and excluded from clergy by the statute of 18 *Eliz. cap. 7.* and so it is in robbery, as hath been said 11 *H. 4. 13. b. Crompt. 32. a. Co. P. C. p. 64.*

If *A.* being a man of full age take a child of seven or eight years old well instructed by him in this villainous art, as some such there be, and the child goes in at the window, takes goods out, and delivers them to *A.* who carries them away,

(*b*) *Kel. ubi supra.*

(*c*) It was adjudged by *Mountagne* chief justice *C. B.* and *Saunders* only related it.

away, this is burglary in *A.* tho the child, that made the entry, be not guilty by reason of his infancy.

So if the wife in the presence of the husband by his threats or coercion breaks and enters the house of *B.* in the night, this is burglary in the husband, tho the wife, that is the immediate actor, is excused by the coercion of her husband.

4. *Domum mansionalem*: what shall be so said.

An indictment, *quod felonice & burglariter fregit & intravit ecclesiam parochialem de D. ea intentione &c.* is a good indictment of burglary, for *ecclesia* is *domus mansionalis*. *Co. P. C. p. 64. Dy. 99. a. (d)*

If *A.* have a dwelling-house, and upon occasion he and all his family are absent a night or more, and in their absence in the night a thief breaks and enters the house to commit felony, this is burglary. *Co. P. C. ubi supra.*

So if *A.* have two mansion-houses, and is sometimes with his family at one, and sometimes at the other, the breach of one of them in the absence of his family from thence is burglary (*e*). *4 Co. Rep. 40. a. 39 Eliz. Dalt. cap. 99. p. 254. (f)*

If *A.* have a chamber in a college or inn of court, where he usually lodgeth in term-time, and in his absence in the vacation his chamber or study be broken open, &c. this is burglary, and the indictment shall suppose it *domus mansionalis A.* *Co. P. C. p. 65. 14 Car. 1. Audley's case* before cited. (*g*)

So it is if *A.* hires a chamber in the house of *B.* for a certain time, wherein he lodgeth, and during the time contracted for it is broke open, &c. this is burglary, and the indictment shall suppose it to be *domum mansionalem* of *A.* (*h*)

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But

(*d*) Lord *Coke* says it is the mansion-house of Almighty God, but this is only a quaint turn without any argument, and seems invented to suit his definition of burglary, *viz.* the breaking into a mansion-house, whereas it appears from *Spelman loco supra citato*, and *22 Assiz. 95.* that it is not necessary to burglary, that a mansion house be broken, for the breaking of churches, the walls or the gates of the city is also burglary, and the word *mansionalis* is only applicable to one

kind of burglary, *viz.* the breaking of a private house, in which case it must be a dwelling-house.

(*e*) Even tho he had never lodged in it, but was removing his goods there in order to lodge in it. *Kel. 46.*

(*f*) *New Edit. p. 488.* See also *Poph. 52. Mo. 660.*

(*g*) *Cro. Car. 473.* by the name of *Evans and Finch.*

(*h*) Chief justice *Keeling* was of a different opinion and thought, in such case the

But if in the king's house at *Whitehall*, or in the great house of any nobleman, there be apartments or lodgings assigned to the jeweller, treasurer, steward, chamberlain, &c. and any of these lodgings be broken up burglarily, the indictment must suppose it to be *domus mansionalis* of the king, or of him that is truly lord or proprietor of the house, for they have the use of the lodgings as servants only, and not as owners; *Hungate's* case before cited. (i)

And so it is if *A.* comes to the inn of *B.* and there hath a chamber appointed for his lodging, and this chamber is broken up burglarily, it shall suppose it to be *domus mansionalis* of *B.* the inn-keeper, because the interest is in him, and *A.* hath only the use of it for his lodging, without any certain interest.

A tent or booth in a fair or market is not such a *domus mansionalis*, wherein burglary may be committed, but robbery therein committed, the owner, his wife or servants being therein, is specially exempted from clergy by the statute of 5 & 6 E. 6. cap. 9. before mentiond. *Co. P. C.* p. 64.

If *A.* have a shop parcel of his mansion-house, and it be broken open in the night, &c. it is a burglary, and the indictment shall suppose, that he brake and entred *domum mansionalem* of *A.* for it is parcel thereof.

But if *A.* let the shop to *B.* for a year, and *B.* holds it, and works or trades in it, but lodgeth in his own house at night, and this shop is broken open, &c. the indictment cannot be, that *domum mansionalem* of *A.* *fregit*, for it was severed by the lease during the time (k), but then whether he may be indicted for burglary, as in the *domus mansionalis* of *B.*? and certainly it is agreed on all hands, if *B.* or his servant sometimes lodge in the shop, it is burglary, and it shall be supposed *domus mansionalis* of *B.* and this is common experience.

7 C

But

the indictment ought to be laid for breaking *domum mansionalem* of *B.* for while there is but one entrance, it is but one dwelling-house, tho there be several inmates, but otherwise it is, if a man di-

vide some rooms from the rest of the house, and make another door to those rooms. *Kel.* 83, &c.

(i) p. 522.

(k) *Kel.* 84.

But suppose he never lodge there, but only works or trades therein in the day-time, and he or his servants never lodge there at night, whether this be a burglary to break and enter this shop to commit a felony?

And certainly it was in this case antiently held burglary, *M. 37 & 38 Eliz. B. R. Cole's case (m)*, an indictment, *quod shopam cujusdam Ricardi burglariter & felonice fregit & intravit &c.* it was admitted for the matter by the court of king's bench to be good, but doubted, whether it was good, because it was *cujusdam Ricardi* without mentioning his surname, and with this also agrees my lord *Coke in terminis, Co. P. C. p. 64.* in these words: *But a shop, wherein any person doth converse being parcel of a mansion-house or not parcel, is taken for a mansion-house.*

But *T. 17 Jac. Hutton's Rep. 33.* it is ruled to be no burglary to break open such a shop, and accordingly the practice hath always gone at *Newgate* sessions since my time or observation, and to this day it is holden no burglary to break open such a shop; but if the shop-keeper, or his servant, usually or often lodge in the shop at night, it is then *domus mansionalis*, in which a burglary may be committed.

Domus mansionalis doth not only include the dwelling-house, but also the out-houses, that are parcel thereof, as barn, stable, cow-houses, dairy-houses, if they are parcel of the messuage, tho they are not under the same roof, or joining contiguous to it, and therefore, if such stable or out-house belonging to the dwelling-house be broken open in the night-time with intent to steal, it is burglary, and with this agrees *Co. P. C. p. 64, 65. Dalt. cap. 99. p. 254, 255.* where for breaking open a back-house of *Robert Castle's*, eight or nine yards distant from the dwelling-house, only a pale reaching between them, two were arraigned and condemned for burglary, and so it was agreed by all the judges in the time of chief justice *Hyde* last 1665. and the law was accordingly, and the contrary practice in one much blamed; and altho it was said by some, that it had not been so used, and that the statute of 4 & 5 P. & M. cap. 4. distinguished between a dwelling-house

ling-house and a barn, yet at length all the judges agreed, that the felonious breaking of a barn, parcel of a messuage, to steal corn was burglary according to my lord *Coke ubi supra*, and with this agrees 2 *E. 6. B. Corone* 180.

But if the barn, or stable, or cow-house be no parcel of the messuage, as if a man take a lease of a dwelling-house from *A.* and of a barn from *B.* or if it be far remote from the dwelling-house, and not so near to it as to be reasonably esteemed parcel thereof; as if it stand a bowshot off from the house, and not within or near the curtilage of the chief house, then the breaking of it is not burglary, for it is not *domus mansionalis*, nor any part thereof.

An indictment that *noctanter clausum* or *curtilagium felonice & burglariter fregit ad occidendum* or *furandum* is not good, and yet 22 *Affix.* 95. burglary is defined to break houses, churches, walls, courts, or gates in time of peace. (n)

So that by that book it should seem, that if a man hath a wall about his house for its safeguard, and a thief in the night break the wall or the gate thereof, and finding the doors of the house open, he enters into the house, this is burglary, but otherwise it had been if he had come over the wall of the court, and found the door of the house open, then it had been no burglary.

5. To make up burglary it must not be only to break and enter a house in the night-time, but either a felony must be committed in the house, or it must be to the intent to commit a felony.

If the indictment be, *quod domum mansionalem J. S. felonice & burglariter fregit & intravit, & ad tunc & ibidem* certain goods of *J. S. felonice & burglariter furatus fuit, cepit & asportavit*, the indictment compriseth two offenses, *viz.* burglary and felony, and therefore he may be acquitted of burglary, if the case be so upon the evidence, and found guilty only of the felony, and then he shall have his clergy.

Or

(n) This was antiently understood only of the walls or gates of the city: vide *Spelman in verbo burglaria*; if so, it will not support our author's following conclusion, wherein he applies it to the wall of a private house.

Or he may be acquitted of the felony; but then *querè*, whether he can be found guilty of the burglary, because tho where the indictment comprileth burglary and felony the indictment is good, tho it be not supposed in the indictment, that it was *ca intentione ad bona furandum*, for the act of theft being charged at the same time, it is a sufficient evidence of his intention, but when he is acquitted of the felony, then there being nothing expressly charged in the indictment, that *burglariter fregit, &c. eâ intentione ad bona &c. felonice furandum*, it stands single as if the indictment had been of single burglary, in which case the clause of *eâ intentione ad furandum &c.* had been necessary to complete a single burglary.

It seems therefore necessary in such case not only to charge him, that *in nocte & burglariter & felonice domum &c. fregit & intravit, & bona &c. cepit*, but also farther to say *eâ intentione ad bona & catalla &c. in eâdem domo existentia felonice & burglariter furandum*, and to add also the particular felony, *& ad tunc & ibidem unum scyphum argenteum &c.* and then, tho he be acquitted of the felony, the rest of the indictment stands good against him as a simple burglary, and he may be convicted of it, tho acquitted of the felony.

And I think that as the offenses of burglary and felony may be joined in the same indictment, so three offenses may be joined in the same indictment, and if he be acquit of the one, he may be convicted of the other two, and it may be of use to exclude a malefactor of his clergy, where the offense is great, as namely for burglary, for felony, and for felony upon the statute of 5 & 6 E. 6. cap. 9. for there may be an offense against that statute, which will exclude from clergy, and yet not amount to burglary; and the form of the indictment may run thus, *Quod A. prima die Februarii anno regni domini Caroli &c. in nocte ejusdem diei vi & armis apud B. felonice & burglariter domum mansionalem fregit & intravit eâ intentione ad bona & catalla ejusdem B. in eâdem domo existentia felonice & burglariter furandum, capiendum & asportandum, & ad tunc & ibidem vi & armis unum scyphum argenteum ejusdem B. in eâdem domo existentem felonice & burglariter furatus fuit, cepit & asportavit, ipso B. ac uxore, liberis & famulis suis in eâdem domo tunc existentibus, contra pacem, &c.*

And

And *note*, that such an indictment need not conclude *contra formam statuti*, it is sufficient that it brings the case so within the statute, as to exclude clergy; and so upon the statute of 23 H. 8. cap. 1.

And upon this indictment, if it fall out upon the evidence, that he is guilty of the burglary, but not guilty of the stealing, he may be convicted of the burglary, and so ousted of clergy, tho he be found not guilty of the felony: again, tho he be found not guilty of the burglary, because it may be the breach of the house was in the day-time, the dweller, his wife or servants in the house, yet he may be found guilty of the felony within the qualifications containd in the indictment pursuant to the statute of 5 & 6 E. 6. and so ousted of his clergy, for that is not confined either to the day or night: again, if upon the evidence it appear not to be burglary, because done in the day-time, nor yet felony so qualified as is excluded from clergy, because either there was no act of breaking, or if there were, yet the dweller, his wife or servants were not in the house, he may be convicted of common larciny, and so have benefit of clergy.

And so much for burglary joined with larciny.

Simple burglary is where the breaking and entring is *eâ intentione ad bona & catalla furandum*, or *ad interficiendum*, &c. and this clause, as it is usually added in cases of simple burglary, so it is necessary, and hereupon these things are observable.

1. That altho the breaking and entring be charged to be done *burglariter*, yet if the intention of that entry be either laid in the indictment, or appear upon the evidence to be to the intent only to commit a trespass and not a felony, as *eâ intentione ad ipsum A. ad tunc & ibidem verberandum*, it is no burglary, but it must be laid and proved to be *eâ intentione* to steal or to kill, or to commit some other felony, for tho the killing or murder may be the consequence of beating, yet if the primary intention were not to kill, the intention of beating will not make burglary. *Co. P. C. p. 65. 13 H. 4. 7. b.*

2. That if a man in the night break and enter a house to the intent to commit a felony, tho he attain not that intent,

but take or steal nothing, this is burglary, and excluded from clergy. 22 *Affix.* 39. & 95. *Dy.* 99. *Crompt.* 31. a. *Coron.* 264. *Stamf. P. C. p. 30. a. Co. P. C. p. 63.* and herein it differs from robbery.

3. It seems, that the intention to commit a felony to make a burglary must be an intention of such a fact, as was felony by the common law, (and not of a felony newly made by act of parliament,) as larciny, or homicide.

It hath been therefore doubted, whether the breaking of a house in the night with intent to commit a rape be burglary or not, *Crompt. fol. 32.* thinks it is not, because made felony by the statute of *Westm. 2. cap. 34. (p)*; but *Dalt. cap. 99. p. 255. (q)* thinks it would be burglary, because rape was felony by the common law, until the statute of *Westm. 1. cap. 13. (r)*, which turned it into a trespass punishable by two years imprisonment; and so the statute of *Westm. 2.* was but a restitution of the common law, and a setting aside of the statute of *Westm. 1.* and this seems to be the more warrantable opinion, that it is burglary; but of this hereafter.

Now as to clergy in case of burglary.

If it be such a burglary, as is also joined with actual theft or robbery, and that robbery or theft be so laid in the indictment, and proved upon evidence, as answers the statute of 23 *H. 8. cap. 1.* or 1 *E. 6. cap. 12.* or 5 & 6 *E. 6. cap. 9.* whereof enough hath been said before, then the principal in such burglary is in those cases, which are within those statutes, ousted of his clergy, and the accessaries before are ousted of their clergy by the statute of 4 & 5 *P. & M. cap. 4.* but the accessaries after have their clergy, as hath been said; but in case of simple burglary, or burglary with theft, laid to be only *felonice & burglariter*, the principal is ousted of clergy, if outlawed or convicted by verdict or confession, but is not ousted of clergy in case of standing mute, not directly answering, or challenging above twenty, by the statute of 18 *Eliz. cap. 7. (f)*

But by the statute of 1 *E. 6. cap. 12.* “ If the breaking of
“ the house be in the day or night-time, with intent to rob

2

“ or

(p) 2 *Co. Inst.* 433.(q) *New Edit. p.* 489.(r) 2 *Co. Inst.* 18.(f) This defect is supplied by 3 & 4
H. & M. cap. 9.

“ or steal, any person being in the house and put in fear, tho
“ nothing be stolen, yet he shall be ousted of his clergy, if
“ convict by verdict or confession, or stand mute, or chal-
“ lenge peremptorily above twenty (*t*)”; for this statute ex-
tends to this special kind of burglary, 11 *Co. Rep.* 36. *b.* *Poulter*
’s case, tho nothing be stolen, and so differs from the sta-
tutes of 23 and 25 *H. 8.* which require a stealing, as well
as a breaking the house.

(But tho in case of robbery in any dwelling-house, and
therewith putting in fear, according to the statute of 23 *H. 8.*
cap. 1. or without putting in fear according to the statute of
5 & 6 *E. 6. cap.* 9. the malicious commanding, hiring or coun-
selling of such offense is put out of clergy, if so specially
laid in the indictment, *Dy.* 183. *b.* by the statute of 4 & 5
P. & M. cap. 4. yet such accessaries before are not oust of
clergy in case of breaking a house to commit a robbery put-
ting in fear, tho the principal be ousted of clergy by 1 *Eliz.*
cap. 12.)

But accessaries before or after are not ousted of clergy by
this statute, or the statute of 4 & 5 *P. & M. cap.* 4.

And this statute doth oust of clergy not only those, that
actually break, or actually enter the house, but also all those,
that are in law principals in burglary, all those that are pre-
sent, aiding and assisting, or that stand to watch at the field
gate, while the others of the confederacy or company break
and enter the house.

And so it differs from the case of robbing of a person in
his dwelling-house, none being within, upon the statute of 39
Eliz. cap. 15. for that statute excludes from clergy only those
persons, that actually enter into the house, and not those, who
tho of the confederacy, and present, aiding and abetting, yet
never entred the house; *quod vide supra.*

But as to accessaries before or after they are not ousted of
their clergy by the statute of 18 *Eliz. cap.* 7. nor doth the
statute of 4 & 5 *P. & M.* extend to oust accessaries before of
clergy

(*t*) This statute does not exclude those who challenge peremptorily above twenty; this according to our author’s opi-
nion, (*vide postea Lib. II. cap.* 48.) was needless; but they are since excluded by 3 & 4 *W. & M. cap.* 9.

clergy in cases of burglary (*u*); but in cases of robbing of houses within the qualifications and circumstances of the statute of 23 *H. 2. cap. 1.* or 5 & 6 *E. 6. cap. 9.* and not to burglary at large. (*x*)

And

(*u*) But they are since ousted by 3 & 4 *W. & M. cap. 9.*

(*x*) Since our author wrote there have been other statutes made to take away clergy in cases of larciny committed in dwelling-houses, &c.

By 3 & 4 *W. & M. cap. 9.* " Clergy " is ousted from those who shall feloniously take away any goods in any dwelling-house, any person being therein and put in fear, or shall rob any dwelling house in the day-time, any person being therein, or shall comfort, aid, counsel or command any person to commit any of the said offenses, or to break any dwelling-house, shop or ware-house thereto belonging and therewith used in the day-time, and feloniously to take away any money or goods to the value of five shillings, altho no person be within such dwelling house, &c. or shall counsel, hire or command any person to commit any burglary, if they be convicted, stand mute, or challenge peremptorily above twenty.

The design of this clause was to deprive the accessaries before of the benefit of the clergy, but this statute not mentioning booths nor out-houses leaves the accessaries in such cases to their clergy.

The same statute enacts, " That persons indicted for a crime, of which being convicted they should not have their clergy by any former statute, shall not have it, if they stand mute, or will not answer directly, or challenge peremptorily above twenty, or be outlawed.

" Persons indicted of felony for stealing of goods, &c. if convicted, stand mute, will not directly answer, or challenge peremptorily above twenty, shall lose their clergy, if it appear upon evidence or examination, that the goods were taken in another county in such a manner, whereof if convicted by a jury of that county they should not have their clergy.

This part of the statute helps the fe-

veral former acts, which were defective either as to the point of standing mute, or challenging peremptorily, or being outlawed.

By 10 & 11 *W. 3. cap. 23.* " All persons, who by night or by day shall in any shop, ware-house, coach-house or stable privately and feloniously steal any goods, wares or merchandizes of the value of five shillings, or more, tho such shop, &c. be not broke open, and tho the owner, or any other person be not therein, or that shall assist, hire or command any person to commit such offense, being thereof convicted or attainted by verdict or confession, or being indicted thereof shall stand mute, or challenge above twenty, shall be excluded from the benefit of clergy.

The uses of this statute are these.

1. By the former statutes (except the case of a booth in a fair or market, by 5 & 6 *E. 6.*) it was necessary in order to take away clergy, that the robbery should be in a dwelling house, whereas this statute extends to shops, ware-houses, &c. tho they should not be adjoining to, or be any part of a mansion-house.

2. The former statutes required there should be an actual breaking or putting in fear, otherwise it would not be a robbery, which is the stealing intended by 39 *Eliz. cap. 15.* as appears from the preamble of that statute; but by this statute, if the goods stolen be of the value of five shillings, the offender is ousted of clergy as to a shop, ware-house, coach house, or stable, tho there be no breaking or putting in fear.

3. By 23 *H. 8.* and 1 *E. 6.* clergy was not taken away, unless there were some person in the house put in fear, nor by 5 & 6 *E. 6.* unless some of the family were in the house or booth; nor by 39 *Eliz.* unless it were in the day-time, and no person in the house, so that if the offense were committed when any person was in the house, if not put in fear, nor one of the family, or when no body was in the house, if it were in the night-

And thus far concerning larciny, robbery and burglary, which are felonies by the common law.

There are two exceptions, that are added hereunto.

1. The first is really true, namely when it is *tempus belli* within the kingdom, and one enemy either steals, robs, or plunders the house or goods of another, and therefore the book of 22 *Affiz.* 95. adds to the definition of burglary *in time of peace*, for in time of war, tho these kinds of offenses committed by those of the same party, or those that are not in hostility one to another, are felonies, yet in time of war, when done by an enemy, they put on another name, as acts of hostility, misprisions, and the like.

Fusque datum sceleri.

2. The second is only supposititious, namely when it is done in case of necessity (y), as a poor person that in case of necessity for hunger shall break and enter a house for victuals under the value of twelve-pence, which is added as an exception to burglary, by *Crompt. fol. 33. a.* and *Dalt. cap. 99. p. 255, 256. (z)*, for tho I do agree a judge ought to be tender in such cases, and use much discretion and moderation, yet this must not pass for law, for then we shall in a little time let loose all the rules of law and government, and burglaries, robberies, yea murders themselves shall be excusable under pretense of necessity, and we shall fall within the wild doctrine of the Jesuitical casuists, who of late in *France* and elsewhere, upon those general misapplied maxims of *Quicquid necessitas cogit, defendit*, and *in casu extremae necessitatis omnia sunt communia*,

7 E

munia,

night-time, in neither of those cases was clergy taken away by those statutes, but this statute takes it away in both those cases as to shops, &c.

But still this statute omitted to mention dwelling-houses or out-houses, wherefore to supply this omission, another statute was made, *viz.*

12 *Ann. cap. 7.* by which it is enacted, "That if any person shall feloniously steal any money, goods, or chattels, &c. of the value of forty shillings in any dwelling-house or out-house thereto belonging, altho it be

" not broken, nor any person therein,
 " or shall assist any person to commit
 " such offense, and shall be convicted
 " by verdict or confession, or stand mute,
 " or will not answer directly, or shall
 " challenge peremptorily above twenty,
 " he shall be debarred from the benefit
 " of clergy.

But both these statutes seem defective as to persons outlawed.

(y) See *Grot. de jur. belli ac pacis, Lib. II. cap. 2. §§. 6 & 7.*

(z) *New Edit. p. 489.*

munia, have adviſed ſervants and apprentices, that it is lawful in point of conſcience to ſteal from their maſters, or rob them in caſe they make them not ſufficient allowances of meat, drink, or clothes: where laws are ſettled there are other remedies appointed for the relief of ſervants againſt oppreſſing maſters, and of the poor, by complaint to the magiſtrate without violating the eſtabliſhed laws of kingdoms or ſtates. (*)

(*) What our author here obſerves is undoubtedly true, that the plea of neceſſity ought not in ſuch caſes to be allowd, and the reaſon is, becauſe the law ſuppoſes, that no man can in a well governd commonwealth be driven to ſuch a neceſſity; this ſuppoſition is the more reaſonable in *England*, where there are ſo many laws, and ſuch large ſums yearly collected for the relief of the poor, as are more than ſufficient for that purpoſe, if rightly applied, yet ſuch is the neglect in the execution of thoſe laws,

that it were to be wiſhed ſome expedient were found out to render that relief more ſpeedy and effectual, leſt, while the neceſſity be real, the relief be only ſuppoſitious, which our author himſelf thought was oft-times the caſe, notwithstanding the proviſions of the law; (*ſee his preface to his diſcourſe touching the proviſion for the poor,*) which makes it reaſonable it ſhould be allowd as an argument for mercy, tho not as a plea in juſtification.

C H A P. XLIX.

Of arſon, or wilful burning of houſes.

THE felony of arſon or wilful burning of houſes is deſcribed by my lord *Coke*, *cap.* 15. *p.* 66. to be *the malicious and voluntary burning the houſe of another by night or by day.*

This was felony at common law (a), and one of the higheſt nature, and therefore by the ſtatute of *Westm.* 1. *cap.* 15. ſuch offenders were not repleviſable (b); and by *Briton* (c) the offenders herein were burnt to death, but as to that the law is changed, they are to be hanged. *H.* 7 *E.* 2. *Coram Rege Rot.* 28. *Norf.* (d)

(a) 3 *H.* 7. 10. a.

(b) 2 *Co. Inſtit.* 188.

(c) *cap.* 9.

By

(d) By the laws of *Ethelſtan* it was capital, *incendiariis capitibus pena eſto*; *vide Leg. Ethelſtan,* l. 6. and by the laws

By the statute of 8 H. 6. cap. 6. dispersing of bills of menace to burn houses, if money be not laid down in a certain place, was made high treason, if the houses were burned accordingly: *vide Rot. Par.* 15 H. 6. n. 23. but as to the treason it is repealed by the statute of 1 E. 6. cap. 12. and 1 Mar. cap. 1. but the felony remains still in case the houses be burned. (e)

In cases of wilful burning of houses the indictment runs, *Quod felonice, voluntarie & malitiose combussit domum* without saying *domum mansionalem*, as in case of burglary. *Co. P. C.* p. 67.

And to examine this felony these things are inquirable, *viz.* 1. What shall be said *domus*. 2. What *domus* of another. 3. What a malicious and wilful burning. 4. What kind of felony this is. 5. Whether and how clergy is allowable.

I. What shall be said *domus*.

It extendeth not only to the very dwelling-house, but to all out-houses, that are parcel thereof, tho not contiguous to it, or under the same roof; as in case of burglary, the barn, stable, cow-house, sheep-house, dairy-house, mill-house. *Co. P. C.* p. 67. 11 H. 7. 1. b. (f)

But if the barn or out-house be not parcel of a dwelling-house, it is not felony, unless the barn have hay or corn in it (g), and then, tho it be no parcel of a dwelling-house, it is felony, 4 *Co. Rep.* 20. a. *Barham's* case; but if the barn have only hay in it, and not corn, the offender shall have his clergy, but if it hath corn in it, he shall be excluded of clergy, tho not parcel of a dwelling-house. *Co. P. C.* p. 69.

The

laws of *Cnut* it was one of those capital offenses, for which no ransom was allowed. *Leg. Cnuti*, l. 61.

(e) But since by the 9 *Geo. I. cap.* 22. it is made felony without benefit of clergy knowingly to send any letter without a name subscribed, or signed with a fictitious name demanding money, venison, or other valuable thing.

(f) The words of the book are, *because the barn was adjoining to the house, it was holden to be felony; to make which serve our author's purpose*

we are not to understand thereby its being contiguous, but being so near the house, as to be parcel thereof.

(g) But by 22 & 23 *Car. 2. cap.* 7. "It is felony maliciously to burn in the night-time any rick or stack of corn, hay or grain, barns or other out-houses, or buildings, or kilns whatsoever." So that now, tho the barn be empty, it is felony; and by 9 *Geo. I. cap.* 22. clergy is taken away from the offender.

The burning of a frame of a house was no felony by the common law, but was made felony by the statute of 37 *H. 8. cap. 6.* but that stands repeal'd by 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.*

The burning of a stack of corn was no felony by the common law, but the attempting of it was made felony by the statute of 3 & 4 *E. 6. cap. 5. (h)*, but that is repeal'd by 1 *Mar. cap. 1. (i)*

But by the statute of 43 *Eliz. cap. 13.* the wilful and malicious burning of any barn, or stack of corn or grain within the counties of *Northumberland, Cumberland, Westmorland* or *Durham*, is made felony without benefit of clergy. (k)

II. What shall be said the house of another.

A tenant for years of a house sets fire to his own house, thereby intending maliciously to fire the house of *B.* if he burn his own house, and also thereby burn the house of *B.* this is felony; but if he burn not the house of *B.* according to his design, but only burn his own house, this is not felony, but a great misdemeanor, for which he was set in the pillory, fined, and perpetually bound to the good behaviour, and yet it was of a house in the city of *London*, and laid that he did it *câ intentione* to burn the houses of others. *M. 10 Car. 1. B. R. Croke 377. Holmes's case*, adjudged.

III. It must be a *burning* of a house of another; therefore if *A.* sets fire to the house of *B.* maliciously to burn it, but either by some accident or timely prevention the fire takes not, this is no felony, tho it were a malicious attempt, for the words are *Incendit & combussit*, but if he had burned part of the house, and the fire is quenched or goes out before

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the

(b) This statute does not make the attempt felony generally, but only where divers persons to the number of twelve are assembled for that purpose, and continue together for the space of an hour after proclamation to depart, or where any above the number of two, and under twelve, shall after proclamation as aforesaid in a forcible manner attempt the same.

(i) But it is made felony by 22 & 23 *Car. 2. cap. 7.* and by 9 *Geo. 1. cap. 22.*

it is felony without benefit of clergy to set fire to any house, barn or out-house, or to any hovel, cock, mow, or stack of corn, straw, hay or wood.

(k) By 1 *Geo. 1. cap. 48.* it is felony maliciously to set on fire any wood, underwood or coppice. By this statute clergy is not taken away, but by 9 *Geo. 1. cap. 22.* it is felony without benefit of clergy to cut down or destroy any trees planted in any avenue, orchard, garden, or plantation.

the whole house be burned, it is felony. *Co. P. C. p. 66. Dalt. cap. 105. (l)*

It must be a *wilful and malicious* burning, otherwise it is not felony, but only a trespass.

And therefore if *A.* shoot unlawfully in a hand-gun, suppose it be at the cattle or poultry of *B.* and the fire thereof sets another's house on fire, this is not felony, for tho the act he was doing were unlawful, yet he had no intention to burn the house thereby, against the opinion of *Dalt. cap. 105. p. 270. (m)*

But if *A.* have a malicious intent to burn the house of *B.* and in setting fire to it burns the house of *B.* and *C.* or the house of *B.* escapes by some accident, and the fire takes in the house of *C.* and burneth it, tho *A.* did not intend to burn the house of *C.* yet in law it shall be said the malicious and wilful burning of the house of *C.* and he may be indicted for the malicious and wilful burning of the house of *C.* *Co. P. C. p. 67. (n)*

An infant of about fourteen years of age or under may be guilty of malicious burning of houses, if by circumstances it can appear he knew it to be evil.

Before me at *Norfolk* a boy about the age of fourteen years was arraigned upon two several indictments for malicious and wilful burning of two several houses, the first was his own father's, and it appeared, that when he had secretly carried fire into the barn and fired it, he falsely charged another with the fact, and upon the boy's accusation he was imprisoned, till it appeared clearly he was not the offender: this boy was afterwards together with his father and his other children entertained at a neighbour's house in charity, and the boy watching opportunity, when none were in the house but a child in the cradle, carried fire out of the kitchen into a room of furzes, and set fire in it and went out, and thus burnt a second house, and the child in the cradle; for both these he was questioned, and at length confessed freely the whole circumstances of both facts, he was indicted, and upon

7 F. his

(l) *New Edit. p. 506.*

(m) *Ibid.*

(n) See the case of *Coke and Woodburne, State Tr. Vol. VI. p. 222.*

his arraignment pleaded, and upon his trial craftily insisted, that he was under fourteen years of age; but I directed the jury, that it appeared by the circumstances, that his malice supplied his age, for it appeared, that he understood the evil of the first offense when he did it so secretly, and yet charged another wrongfully; but if there had been any doubt of the first burning, yet he could not but be confusant, that the second burning was a great crime, when he saw another formerly charged by him with the first burning committed as for felony; but yet for my farther satisfaction, and in respect the boy seemed very little, I took farther examination touching his age, and his father being by freely confessed and was content to swear, that he was above fourteen and near fifteen years of age, and he was convicted and executed.

IV. What felony this is.

And it seems unquestionable, that the burning of a dwelling-house, or any part thereof, or any out-house part thereof was a felony at common law, and so was also the burning of a barn with hay or corn in it, tho not parcel of a dwelling-house, but standing at a distance. *Co. P. C. p. 67. 11 H. 7. 1. b.*

V. But as to the point of the not allowance of clergy therein, there may be some matters to be examined: certain it is, that at this day clergy is not allowable to a party convicted of wilful and malicious burning of a dwelling-house, or of a barn with corn; *quod vide 11 Co. Rep. 34: Poulter's case adjudged per omnes Justic. Plow. Com. 475. Co. P. C. p. 67.* and the constant practice hath been to deny clergy to those convicted of this crime; *quod vide* in the resolution of *Poulter's case*.

And the statute of 4 & 5 P. & M. cap. 4. takes away clergy from all accessaries before to the offenses of wilful burning any dwelling-house, or of any barn then having corn or grain in the same; and surely they took the law to be, that the principal was by law ousted of his clergy, or otherwise they would not have ousted the accessory of his clergy.

But then the question remains, what it was that ousted the principal of his clergy.

By the statute of 23 *H. 8. cap. 1.* clergy was ousted from all persons found guilty of wilful burning of any dwelling-houses or barn, wherein any grain or corn should happen to be, and from all persons found guilty of abetting, aiding or counselling thereof, *viz.* accessaries before; except persons in order of subdeacon, or above.

The statute of 1 *E. 6. cap. 12.* as to divers offenses therein particularly mentiond, which are for the most part also included in the statute of 23 *H. 8.* carried the exclusion of clergy farther, *viz.* as to standing mute, or not directly answering, but mentions not at all wilful burning of houses, or barns with grain; and enacted, that in all other cases of felony persons indicted shall have their clergy, as they should have had before 1 *H. 8.*

So that by the act of 1 *E. 6.* clergy was restored to burning of houses and barns with corn, notwithstanding the statute of 23 *H. 8.* or any other statute made since the first year of *Henry VIII.* and if the ousting of the principal in arson from his clergy rested upon the statute of 23 *H. 8.* then the statute of 1 *E. 6.* had restored him to his clergy.

The solution therefore of this matter is upon two accounts.

1. Some have thought that the wilful burning of houses was not within clergy by the common law, nor by the statute of 25 *E. 3. cap. 4.* because it was an hostile act (*o*), and therefore, as until the statute of 4 *H. 4. cap. 2. Infidiatōres viarum & depopulatores agrorum* joined with another felony, and so found, were ousted of their clergy, because favouring of acts of hostility, so *incendiatores domorum* were even by the common law ousted of clergy before the statute of 23 *H. 8.* and so are not restored to clergy by the general clause of the statute of 1 *E. 6.* and this I remember was deliverd as the reason of the exclusion of clergy from wilful burning by Mr. Attorney *Noy, 3 Car. 1.* in the king's bench, and seemed to be assented to by the court.

But I think this will hardly help the matter, 1. Because tho possibly clergy might not be allowd at common law to
wilful

(*o*) And so interpretatively a felony which by that statute was ousted of touching the person of the king himself, clergy.

wilful burning, yet the statute of 25 E. 3. *cap.* 4. *pro clero* extends clergy to all treasons and felonies touching other persons than the king himself, and his royal majesty. 2. Because then as well a burning of a barn with hay, as a barn with corn, would be excluded from clergy, for the one is as hostile as the other.

2. Others have thought that the statute of 4 & 5 P. & M. *cap.* 4. taking away clergy from the accessaries before doth take away by necessary consequence the clergy from the principal, for it were not reason to think the accessary before should be in a worse condition, than the principal offender, and therefore virtually and implicatively and by necessary consequence it takes away clergy from the principal in all those cases, where it takes it from the accessary before, and besides, if the principal had his clergy, the accessary could not be arraigned, and this I think is true, tho this case needs not this help.

But I think, and so is the book of 11 *Co. Rep.* 34, 35. that the statute of 25 H. 8. *cap.* 3. which extends to take away clergy in all those cases, which were within 23 H. 8. *cap.* 1. and particularly recites that of burning houses and barns with grain, and farther extends that exclusion to standing mute, not directly answering, challenging above twenty, I say that statute of 25 H. 8. was in great part repeald by the statute of 1 E. 6. and is entirely revived by the statute of 5 & 6 E. 6. *cap.* 10. not only as to the point of ousting clergy upon examination (*p*), but also as to the exclusion of clergy in those cases mentiond in the act of 25 H. 8. wherein burning of houses and barns with corn is expressly mentiond, so that consequently this statute of 5 & 6 E. 6. reviving the statute of 25 H. 8. repeals the generality of that clause in 1 E. 6. whereby clergy was let in in all cases there not enumerated.

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And

(*p*) This relates to the second clause of the 25 H. 8. *cap.* 3. whereby it is provided, that if any persons be indicted in one county for stealing goods in another, and stand mute, or challenge peremptorily above twenty, or will not directly answer, they shall be put from their clergy in like manner, as if they

had been tried and found guilty in the same county, where the offense was committed, if it appear to the justices by the evidence or on examination, that it was such a felony, as if found guilty thereof in the county where committed, they would have lost their clergy by the 25 H. 8. *cap.* 1.

And consequently the periods of this case of clergy in wilful burning stand thus.

1. Before 23 *H. 8.* clergy was allowable therein by force of the statute of 25 *E. 3. pro clero.*

2. After 23 *H. 8.* until 25 *H. 8.* clergy was allowable for the accessory in all cases, and for the principal in all cases, but finding him guilty.

3. After 25 *H. 8.* until 1 *E. 6.* clergy was taken away from the principal as well where he stands mute, not directly answers or challenges above twenty, as where he is found guilty.

But the accessories as well before as after were to have clergy.

4. After 1 *E. 6.* till 5 & 6 *E. 6.* when the statute of 25 *H. 8.* was revived, both principal and accessories had their clergy in all cases of burning.

5. After 5 & 6 *E. 6.* till 4 & 5 *P. & M. cap. 4.* the principal was excluded in all cases, wherein he was excluded by the statute of 25 *H. 8.* as well where he stood mute, challenged above twenty, did not directly answer, as where found guilty. (q)

But the accessories before as well as after had their clergy.

6. By the statute of 4 & 5 *P. & M. cap. 4.* until this day accessories before are excluded of clergy in all cases, but accessories after have their clergy.

But yet there still remain two doubts.

1. Whereas the statute of 4 & 5 *P. & M. cap. 4.* extends to oust clergy from the accessory, as well if he be attainted as convicted, and consequently if outlawed, he shall not have clergy, because it is an attainder; the statute of 25 *H. 8.* extends only to finding guilty, challenging above twenty, standing mute, or not directly answering, and it seems in attainder of the principal by outlawry he shall have his clergy; therefore *quere*, whether an attainder by outlawry oust the principal of clergy upon the statute of 23 or 25 *H. 8.*

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2. Whereas

(q) By 3 & 4 *W. & M.* clergy is taken away in case of outlawry also.

2. Whereas the statute of 4 & 5 P. & M. *cap.* 4. hath no exception of persons in the order of sub-deacon; but accessaries before are ousted of their clergy in all cases by that statute, tho in orders.

Yet by the statute of 25 H. 8. which is relative to the statute of 23 H. 8. principals in the order of sub-deacon, or above, have their clergy in the case of arson, for by the statute of 23 H. 8. clergy is saved to men in orders, where found guilty; and by the statute of 25 H. 8. in cases of standing mute, &c. they are ousted of their clergy as if found guilty, in which case men in orders had their clergy, and so the reviving of the statute of 25 H. 8. by that of 5 & 6 E. 6. lets in men in orders to their clergy in case of arson, which seems to make this absurdity, that the principal in arson shall have the benefit of clergy if in orders, but the accessaries before, tho in orders, are excluded by the general penning of the act of 4 & 5 P. & M.

And herein there will arise a difference as to men in orders in relation to the benefit of clergy between the case of being principal in wilful burning of houses, and the case of being principal in robbery in or near the highway, or robbing in a dwelling-house, putting the dweller in fear, or murder of malice prepense; for the act of 1 E. 6. *cap.* 12. excludeth them from their clergy generally without exception of men in orders, tho they were excepted by the statutes of 23 and 25 H. 8.

But this statute of 1 E. 6. making no mention of burning of houses, the exclusion of them from clergy, if resting upon the statute of 25 H. 8. revived by 5 & 6 E. 6. excepts them.

C H A P. L.

Concerning felonies by the common law, relating to the bringing of felons to justice, and the impediments thereof, as escape, breach of prison, and rescue; and first touching arrests.

I Come now according to the method propounded to consider those felonies, that relate to the public justice of the kingdom in bringing malefactors to their due punishment, and the impediments thereof, and they are principally three, *viz.* 1. By the party arresting or imprisoning, as voluntary escapes. 2. By the party arrested and imprisoned, as breach of prison. 3. By a stranger, as rescue of felons.

And in this order I shall examine these offenses, but as a necessary preliminary thereunto, I shall first consider of arrests and imprisonment for capital offenses, by whom it may be done, and where lawful.

Arrests of malefactors are of two kinds, 1. Either by persons thereunto by law deputed, or 2. By private persons.

And the former is again of two kinds. Either, 1. By process of law, or 2. *Virtute officii.*

The former again is of two kinds, 1. Either by process in the king's name, 2. Or by warrant in the name of a judge or justice thereunto authorized, and that either in writing or *ore tenus.*

I shall pursue this order, and

I. Shall begin with the first of these, namely, arresting by virtue of the king's writ.

Regularly no process issues in the king's name and by his writ to apprehend a felon or other malefactor, unless there

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be an indictment, or matter of record in the court, upon which the writ issues.

Antiently the process upon an appeal or an indictment of felony was only one *Capias*, and thereupon an *Exigent*. 22 *Affiz.* 81.

By the statute of 25 *E. 3. cap. 14.* there are to be a *Capias* and an *Alias* with a command to the sheriff to seize the goods of the felon, and then an *Exigent*.

But it should seem by the book of 2 *H. 5. 6.* that this statute extended not to felony of death, but that there should be only one *Capias*, and then an *Exigent*.

But by the statute of 6 *H. 6. cap. 1.* if *A. de B. in comitatu S.* be indicted in the king's bench in *Middlesex*, there shall go out one *Capias* into *Middlesex*, another into *S.* and each shall have six weeks at least between the *Teste* and return, and upon *Non inventus* returned then an *Exigent*.

But if he be not named of another county, then it seems only one *Capias* shall issue, where the party is indicted, and upon that an *Exigent*: this statute was made during the king's pleasure, but by the proviso in the statute of 2 *H. 6. cap. 10.* it seems to be made perpetual.

By the statute of 2 *H. 6. cap. 10.* if *A. de B. in com. S.* be indicted or appeal'd *in com. W.* before justices assigned, there shall go out first a *Capias in com. W.* and upon *Non inventus* returned a *Capias* with proclamations *in com. S.* having three months at least between the *Teste* and return, or otherwise no *Exigent* to issue; but the process in the king's bench is excepted.

But this statute only extends, where the party is indicted in another county, than where conversant.

By the statute of 5 *E. 3. cap. 11.* justices of *oyer and terminer* may issue process against felons in a foreign county, and these processes ought, or at least may and are most fit to issue in the king's name under the *Teste* of the chief judge, for which purpose all clerks of assizes have a special seal, and issue their process in the king's name in case of felony, where they go to the outlawry, tho' some other warrants are made in the name of the judge.

And in all cases the king's writs are directed to the sheriff, and he executes the writ himself or by his warrant under seal to the bailiffs.

And upon these writs the sheriff or his bailiff may break open doors to take the offenders, for they are for the king and preservation of the peace, and therefore include a *non omittas propter aliquam libertatem; quod vide 5 Co. Rep. 92. a.*

And in this case the sheriff or his bailiff may require any persons present to assist him in execution of the writ, and he, that refuseth to assist him, is indictable and punishable by fine and imprisonment.

II. The second kind of arrest is by warrant under the seal of the justices thereunto authorized, as justices of *oyer and terminer*, or of gaol-delivery, or justices of peace.

And herein these things are considerable: 1. What are the essentials of such a warrant, without which it is void in law. 2. Who may grant a warrant to apprehend a felon. 3. To whom, and 4. In what order or method it is to be granted, or 5. Executed, and in what case.

1. As to the first of these.

It is necessary that such warrant express the name of the party to be taken, for a warrant granted with a blank and sealed, and after filled up with the name of the party to be taken is void in law. *Dalt. cap. 117. p. 329. (a)*

It must be under seal, tho some have thought it sufficient if it be in writing subscribed by the justice, *Dalt. cap. 117. p. 328. vide 2 Co. Instit. supra statutum de frangentibus prisonam, p. 591.* and the failing in these things will make the warrant void, and subject the officer to a false imprisonment; tho in some cases the want of due formality may be blameable in him that makes the warrant, yet it will not therefore subject the officer to a false imprisonment, if the matter be within the jurisdiction of him that makes it; as for instance,

A warrant by a justice to apprehend *J. S.* to answer such matters as shall be objected against him *ex parte domini regis* without expressing the certainty of the crime, this is not regular, *Lambard's justice 95, 96. 2 Co. Instit. 591, 615.* tho

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Mr. *Dalt. cap. 117. p. 329.* gives instances of such warrants granted by *Popham* chief justice.

And therefore, if before commitment a person so apprehended should be removed into the king's bench by *Habeas Corpus* upon such a warrant, or should be committed upon such a general *Mittimus*, he should be discharged, or in case he should be rescued upon such an apprehension by such a warrant, or be voluntarily let go by him that apprehends him, (tho it may be the true cause of the warrant were felony,) yet it not being expressed in the warrant, such an escape or such a rescue would not be felony.

Yet it may excuse the officer in false imprisonment, if the true cause were felony, or any misdemeanor within the cognizance of him that makes the warrant, for it is but an erroneous, not a void warrant, and it is not reasonable to suppose the officer should be constant of the formalities of law, or advise with counsel upon all occasions, whether the warrant were in strictness of law regular, especially in such a case where the error of this nature hath been seconded with common practice; but of this more hereafter.

2. As to the persons, that may grant a warrant for apprehending a felon.

The chief justice of the king's bench or any other judge of that court may issue a warrant in his own name, for the apprehending and bringing before him any person touching whom oath is made of a felony committed, or of suspicion of felony upon him, into any county of *England* or *Wales*, for they are intrusted with the conservation of the peace through all *England*, and are more than justices of peace or *oyer* and *terminer*, and this hath been usual in all ages.

But to avoid the trouble to the country in bringing up offenders they usually direct their warrants to apprehend the parties, and bring them before some justice of peace near adjoining, either to be examined or bound over to the sessions and farther to be proceeded against according to law.

And thus their warrants ought to run in cases of surety of the peace or good behaviour against a person in another county, than where they are by reason of the statute of 21 *Jac. cap. 8.*

Justices of *oyer* and *terminer* may also issue their warrants in the counties within their commission for apprehending felons or other malefactors, or for surety of the peace within their limits; *quere*, whether they may not issue their warrants for any indicted of felony within their precincts, tho they are abroad in a forein county, by the statute of 5 E. 3. before-mentioned?

Justices of peace may also issue their warrants within the precincts of their commission for apprehending persons charged of crimes within the cognizance of the sessions of the peace, and bind them over to appear at the sessions, and this, tho the offender be not yet indicted.

And therefore the opinion of my lord *Coke*, 4 *Instit.* 177. is too strait-laced in this case, and, if it should be received, would obstruct the peace and good order of the kingdom; and the book of 14 H. 2. 16. upon which he grounded his opinion, was no solemn resolution, but a sudden and extrajudicial opinion, and the defendant had liberty to mend his plea as to the circumstance of time, to the end it might be judicially settled by demurrer, which was never done; and the constant practice hath obtained contrary to that opinion; *quod vide Dalt. cap.* 117. (b)

And whereas my lord *Coke ubi supra* saith also, that a justice of peace upon oath made by *A.* of a felony committed, and that *A.* suspects *B.* and shews his cause, cannot issue a warrant to bring *B.* before him for farther examination, and thereupon commit or bind him over to the assizes or sessions, because it must be the proper suspicion of *A.* himself, and *A.* may arrest him upon the score of his own suspicion, but not by warrant of the justice; I think the law is not so, and the constant practice in all places hath obtained against it, and it would be pernicious to the kingdom if it should be as he delivers it, for malefactors would escape unexamined and undiscovered, for a man may have a probable and strong presumption of the guilt of a person, whom yet he cannot positively swear to be guilty.

Therefore I think, that if *A.* makes oath before a justice of peace of a felony committed in fact, and that he suspects *B.*
and

and shews probable cause of suspicion, the justice may grant his warrant to apprehend *B.* and to bring him before him, or some other justice of peace to be examined, and to be farther proceeded against, as to law shall appertain; and upon this warrant the constable, or he, to whom the warrant is directed, may arrest him, and if occasion be, may break doors to take him, if within a house, and will not upon demand render himself, as well as if it were an express and positive charge of felony sworn by *A.* against him, and so hath common practice obtained notwithstanding that opinion: *vide* statute *Westm. I. cap. 15. (c), 13 E. 4. 9. a.*

But a general warrant upon a complaint of a robbery to apprehend all persons suspected, and to bring them before, &c. was ruled void, and false imprisonment lies against him, that takes a man upon such a warrant, *P. 24 Car. 1.* upon evidence in a case of justice *Swallow's* warrant before justice *Roll.*

If *A.* hath committed treason, tho' the justices of the peace have no cognizance of it as treason, yet they have cognizance of it as a felony, and as a breach of the peace, and therefore a justice of peace upon information upon oath may issue his warrant to take him, and may take his examination, and commit him to prison.

A. commits a felony in the county of *B.* and then goes into the county of *C.* upon information given to a justice of peace of the county of *C.* he may issue his warrant to take him, may take his examination, and commit him to gaol in the county of *C.* from whence he may be removed by *Habeas Corpus* to the county of *B.* for his trial.

If *A.* commit a felony in the county of *B.* and upon a warrant issued against him by a justice of peace in the county of *B.* he is pursued and flies into the county of *C.* and there is taken, he must not by virtue of that warrant be carried to a justice of peace of the county of *B.* where he committed the felony, but to a justice of peace in the county of *C.* where he was taken.

But if *A.* were taken by the warrant in the county of *B.* and break away into the county of *C.* and be there taken upon

fresh suit by them that first took him, he may be either brought to a justice of the county of *C.* where he was last taken, or before the justice of the county of *B.* by whose warrant he was first taken, for in supposition of law he was always in custody: *vide dubitatur* 13 *E.* 4. 9. *a.*

If *A.* be in commission of the peace in the county of *B.* and happen to be in the county of *C.* and there complaint is made to him of a felony in the county of *B.* where he is in commission, as he cannot issue a warrant out to apprehend the party, so neither can he imprison in the county of *C.* because an act of jurisdiction, but he may take an oath of a party robbed in pursuance of the statute of 27 *Eliz.* or he may take an examination or information, or recognizance in a forein county, but cannot compel them by imprisonment. *P.* 7 *Car.* 1. *Croke*, *n.* 3. *Helyar's case* (*d*), *Dalt. cap.* 6. and 117. (*e*)

But if *A.* be a justice of peace in two adjacent counties; tho by several commissions, as the recorder of *London* is, nothing is more usual for him, than whilst he lives in one county to send his warrants to apprehend malefactors in another, and to send them to *Newgate*, which is the common gaol of both counties *London* and *Middlesex*.

3. Touching the persons, to whom a warrant may be directed.

The justice, that issues the warrant; may direct it to a private person if he please, and it is good, but he is not compellible to execute it, unless he be a proper officer. 14 *H.* 8. 16. *Dalt. cap.* 117. *p.* 332. (*f*)

The warrant is ordinarily directed to the sheriff or constables, and they are indictable and subject thereupon to a fine and imprisonment, if they neglect or refuse it.

If directed to the sheriff, he may make a warrant to his bailiff to execute it.

If to a constable, tithing-man, &c. he must execute it himself, and may not substitute another, but he may call any persons to assist him, and they are bound to assist him, and are indictable if they neglect or refuse to assist: *vide Dalt. ubi supra.*

If directed to the constable of *D.* he is not bound to execute the warrant out of the precincts of his constablewick, but if he doth it out of his constablewick, it is good, and so it was ruled in *Norfolk* in an action of trespass.

4. Touching the order in granting it.

1. It is convenient, tho not always necessary, to take an information upon oath of the person that desires the warrant, that a felony was committed, that he doth suspect or know *J. S.* to be the felon, and if suspected, then to set down the causes of his suspicion.

2. If the charge of the felony be positive and express, then it is fit to bind the party by recognizance to prosecute, before the warrant be issued.

But if it be only a charge of suspicion, and the business requires farther examination, then it is neither necessary, nor fit to bind over the party to prosecute, for possibly upon the bringing in of the party accused and farther examination of the fact there may be cause to discharge him, and thus I think *Mr. Dalton* to be intended, *cap. 117. p. 334. (g)*, the case before chief justice *Flemming*.

3. The warrant may issue to bring the party before the justice, that granted the warrant specially, and then the officer is bound to bring him before the same justice, but if the warrant be to bring him before any justice, then it is in the election of the officer to bring him before what justice of the county he thinks fit, and not in the election of the prisoner. *5 Co. Rep. 59. b. Foster's case.*

5. Touching the demeanor of the officer in executing the warrant.

If it be a warrant for felony, or a warrant for surety of the peace, the officer may break open the door, if he be sure the offender is there, if after acquainting them of the business, and demanding the prisoner, he refuse to open the door, tho the party be not indicted; and this is the constant practice against the opinion of my lord *Coke*, *4 Inst. 177. quod vide Dalt. cap. 117. p. 333. (b)*

And so it is if the warrant be only upon suspicion of felony, as hath been said before, for in both cases the process is for the king, and therefore a *Non omittas* is implied, and he, that diligently considereth the statute of *Westm. 1. cap. 15. (i)*, and the statute of 2 & 3 P. & M. cap. 10. will find that an imprisonment may be made by the justice, as well for suspicion of felony, as for an absolute charge of felony, and that as well before indictment as after.

And by the book of 13 E. 4. 9. a. A man, that arrests upon suspicion of felony, may break open doors, if the party refuse upon demand to open them, and much more may it be done by the justice's warrant.

If the officer be demanded he must shew his warrant, but if he doth it *virtute officii* as a constable, &c. it is sufficient to notify, that he is the constable, or that he arrests in the king's name. *Dalt. ubi supra, 6 Co. Rep. 54. a. 9 Co. Rep. 69. a. Mackally's case.*

Lastly, What is to be done after the warrant served, and when the person accused is brought before the justice thereupon.

If there be no cause to commit him found by the justice upon examination of the fact, he may discharge him.

If the case beailable, he may bail him.

If he have no bail, or the case appears not to beailable, he must commit him.

And being either bailed or committed, he is not to be discharged till he be convicted or acquitted, or delivered by proclamation. *Co. P. C. cap. 100. p. 209.*

And this leads me to the *Mittimus* or the warrant to the gaoler to receive him; and this is the ground of the felony in case of a breach of prison.

My lord Coke, 2 *Instit.* 591. makes three essential parts of the *Mittimus*.

1. That it be in writing sealed by the justice that commits, and without this part the commitment is unlawful, the gaoler is liable to a false imprisonment, and the wilful escape by the gaoler, or breach of prison by the prisoner, makes no felony.

But

(i) 2 Co. *Inst.* 185.

But this must not be intended of a commitment in a court of record, as the king's bench, gaol-delivery, or sessions of the peace, for there the record itself, or the memorial thereof, which may at any time be entred of record, are a sufficient warrant without any warrant under seal.

2. That it express the cause for which he is committed, namely felony, and what kind of felony.

This seems requisite to make the voluntary escape or breach of prison felony, and also it is necessary upon return of the *Habeas Corpus* out of the king's bench; because that is in nature of a writ of right or writ of error to determine, whether the imprisonment be good or erroneous.

But it seems not to make the commitment absolutely void, so as to subject the gaoler to a false imprisonment, but it lies in averment to excuse the gaoler or officer, that the matter was for felony.

And also upon such a general warrant without expressing any felony or treason, or surety of the peace, the constable cannot break open a door. *T. 9 Jac. B. R. 1 Bulstrode 146. Foster's case.*

3. That it have an apt conclusion, *viz. There to remain till deliverd by law.*

But if the conclusion be irregular, I think it makes not the warrant void, but the law will reject that which is superfluous, and the rest shall stand.

And therefore if the cause be expressed, and the conclusion irregular, as *till farther order given by the justice*, yet a breach of prison under such a warrant will be felony, yea, if the party be removed by *Habeas Corpus*, tho the conclusion be irregular, yet if the matter appear to be such, for which he is to remain in custody, or be bailed, he shall be bailed or committed as the case requires, and not discharged, but the idle conclusion shall be rejected.

And therefore I do think that such a warrant is a good justification in a false imprisonment, tho the right conclusion be omitted, or tho the wrong conclusion be inserted, if the matter of the *Mittimus* be otherwise sufficient to charge him in custody, and therefore it is a lawful warrant notwithstanding

ing the omission or incongruity of the conclusion, so as to make the voluntary permission of an escape or the breach of prison felony.

By the statute of 23 *H. 2. cap. 2.* the felons are to be sent to the common gaol (*i*); and by the statute of 4 *E. 3. cap. 10.* the sheriffs and gaolers are bound to receive them, whether committed by justices, or attached *ex officio* by constables.

Previous to the commitment of felons, or such as are charged therewith, there are required three things, 1. The examination of the person accused, but without oath. 2. The farther information of accusers and witnesses upon oath. 3. The binding over of the prosecutor and witnesses unto the next assizes or sessions of the peace, as the case requires.

1. The examination of the person accused, which ought not to be upon oath, and these examinations ought to be put in writing, and returned or certified to the next gaol-delivery or sessions of the peace, as the case shall require by the statute of 2 & 3 *P. & M. cap. 10.* and being sworn by the justice or his clerk to be truly taken may be given in evidence against the offender. (*k*)

And in order thereunto, if by some reasonable occasion the justice cannot at the return of the warrant take the examination, he may by word of mouth command the constable or any other person to detain in custody the prisoner till the next day, and then to bring him before the justice for farther examination; and this detainer is justifiable by the constable, or any other person, without shewing the particular cause, for which he was to be examined, or any warrant *in scriptis.* *T. 37 Eliz. Rot. 244. B. R. Broughton and Marshaw. (l)*

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But

(*i*) *And not elsewhere,* so that it should seem that commitments to *New Prison* or the *Gate-house* are irregular; see 2 *Co. Inst. 45. Cro. Eliz. 830.* and of this opinion was chief justice *Holt* in the case of *Kendal and Roe, State Tr. Vol. IV. p. 862.* See also 5 *H. 4. cap. 10.* which ordains, "That none be imprisoned by justices of the peace, save only in the common gaol." 9 *Co. Rep. 119. b.*

(*k*) Altho they be not evidence against any other person named in them; it was therefore very irregular in the chief justice to refuse reading the examinations of *Stern* and *Boroski* at their trial; see *State Tr. Vol. III. p. 470.*

(*l*) This case is reported in *Moore 408.* by the name of *Broughton and Mulshoe.*

But the time of the detainer must be reasonable, therefore a justice cannot justify the detainer of such person sixteen or twenty days in order to such examination. (*m*)

2. He must take information of the prosecutor or witnesses in writing upon oath, and return or certify them at the next sessions or gaol-delivery, and these being upon the trial sworn to be truly taken by the justice or his clerk, &c. may be given in evidence against the prisoner, if the witnesses be dead or not able to travel.

3. Before he commit the prisoner he is to take surety of the prosecutor to prefer his bill of indictment at the next gaol-delivery or sessions, and likewise to give evidence; but if he be not the accuser, but an unconcerned party, that can testify, the justice may bind him over to give evidence, and upon refusal in either case may commit the refuser to gaol. *Stamf. P. C. p. 163. a. Dalt. cap. 116. p. 326. (n), 2 & 3 P. & M. cap. 10. and Dalt. cap. 20. p. 55. (o)*

And thus far of arrests by warrant in writing.

Next come to be considered arrests by command *ore tenus* or by order.

The chief justice, or other justice of the king's bench, may command *ore tenus* the marshal or any of his deputies commonly called tipstaves to arrest any person, and such command is a good justification in false imprisonment brought, altho 1. It be not in writing. 2. Altho no cause is expressed in the command, but only generally to answer such things, as shall be objected against him *ex parte domini regis*. 3. And altho the command be *ita quod habeas corpus coram capitali justiciario &c. quandocunque &c.* for it shall be intended, *when the party complains*. 4. Altho the defendant declares not in his justification, what he did with him in the mean time. *P. 11 Car. B. R. Throgmorton and Allen, adjudged upon a demurrer. (*)*

Altho, as hath been said, a justice cannot grant a warrant to apprehend all persons suspected, but must name their names, yet I have known in the king's bench upon a riot

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(*m*) See the case of *Scavage and Tateham, Cro. Eliz. 829.* where it was adjudged, that the time of detainer must not exceed three days.

(*n*) *New Edit. cap. 168. p. 572.*

(*o*) *New Edit. cap. 40. p. 106.*

(*) *2 R. A. p. 558.*

committed in the night by persons disguised, and whose names have not been known, the court hath made an order to apprehend persons, that the party, who was injured, suspects, and to bring them into the court to be examined, and such order of the court is a good warrant for the sheriff or constable to do it; but what is thus done in the highest court of ordinary justice, is not to be a pattern for particular justices or inferior jurisdictions.

I have now done with arrests by writs or warrants.

I come in the next place to arrests *ex officio* without any warrant.

If an affray be made in the presence of a justice of peace, or if a felon be in his presence, he may arrest him, and detain him *ex officio* till he can make a warrant to send him to gaol, but then the warrant must be in writing to the gaoler, P. 23 *Car. B. R. Sandford's case*, and so he may by word command any present to arrest. *Dalt. cap. 117. p. 328. (p)*

A constable may *ex officio* arrest a breaker of the peace in his view, and keep him in his house, or in the stocks, till he can bring him before a justice of peace.

So if *A.* be dangerously hurt, and the common voice is, that *B.* hurt him, or if *C.* thereupon come to the constable and tell him that *B.* hurt him, the constable may imprison him till he know whether *A.* die or live. T. 43 *Eliz. B. R. Dumbleton's case*, or can bring him before a justice.

So if a felony be committed, and *A.* acquaint him that *B.* did it, the constable may take him and imprison him, at least till he can bring him before some justice of peace.

But if there be only an affray and not in view of the constable, it hath been held he cannot arrest him without a warrant from the justice; but it seems he may to bring the offender before a justice, tho not compellible.

Lastly, I come to the authority of every private person in relation to arrests of felons.

If *A.* commit a felony, *B.* who is a private person, may arrest him for that felony without any warrant, nay farther, if *A.* will not suffer himself to be taken, but either resists or
flies

flies so that he cannot be taken unless he be slain, if *B.* or any in assistance in that case of necessity kill him, it is no felony; *de quo antea p. 481.*

If *A.* commit a felony in the sight of *B.* and *B.* use not his best endeavours to apprehend him, or to raise hue and cry upon him, it is punishable by fine and imprisonment. *Co. P. C. p. 53.*

If *A.* strike *B.* dangerously in the presence of *C.* *C.* may justify the imprisoning of *A.* till he can bring him before a justice, or deliver him to the constable, tho it be no felony till death.

If a hue and cry be levied upon a felony, and come to the town, *B.* the constable, and those of the town are bound to apprehend the felon if in the town, or if not in the town, then to follow the hue and cry, otherwise they are punishable upon an indictment. *Co. P. C. cap. 52.*

If the constable in pursuit of a felon require the aid of *J. S.* he is bound by law to assist him, and is finable for his neglect. (*q*)

If a felony be committed in fact, and *A.* suspects *B.* did it, and hath probable cause of suspicion, *A.* may arrest *B.* for it, and justify it in an action of false imprisonment. *2 E. 4. 8. b.*

The causes of suspicion are many, as common fame, finding goods upon him, and many more, *de quibus vide Dalt. cap. 118. (r)*

If a felony be committed, and *A.* suspect *B.* and *B.* being in his house refuse to open the doors or render himself, it seems *A.* may break open the doors to take him, and so may the constable, if *A.* acquaint him therewith, especially if *A.* be present, *13 E. 4. 9. a.* tho (as hath been said) my lord Coke, *4 Instit. 177.* be to the contrary, yet the common practice and opinion hath obtained in that case against my lord Coke, *Dalt. cap. 98. p. 249. (f), cap. 78. p. 204. (t), 7 E. 3. 16. b.*

There are special cases where a constable having received information of the misdemeanors following, or any private person

(*q*) *13 H. 7. 10. b.*

(*r*) *New Edit. cap. 170.*

(*f*) *New Edit. p. 482.*

(*t*) *New Edit. p. 426.*

person without a warrant may arrest and break open doors to arrest, if they within refuse to open them upon demand, or to deliver up the party.

1. Where a felony or treason is committed, and the offender is within the house.

2. Where a felony or treason is committed, and a man suspects *J. S.* who is in the house, and hath probable cause of such suspicion, tho the party be not indicted. 7 E. 3. 16. b. 13 E. 4. 9. a.

3. Where *A.* hath dangerously wounded *B.* and then *A.* flies into the house, whether it were done in the presence of the constable, or him that arrests or not. 7 E. 3. 16. b. *Crompt.* 171. a.

4. Where there is an affray made in a house, and the doors are shut, and are refused to be opened, during such affray the constable or any other may break open the doors to preserve the peace, and prevent bloodshed; but after the affray it cannot be done without a warrant, unless a man be dangerously wounded or killed in the affray.

Yet to avoid question in these cases, it is best to obtain the warrant of a justice, if the time and necessity will permit.

When a private person hath arrested a felon, or one suspected of felony, he may detain him in custody till he can reasonably dismiss himself of him; but with as much speed as conveniently he can, he may do either of these things.

1. He may carry him to the common gaol, 20 E. 4. 6. b. but that is now rarely done.

2. He may deliver him to the constable of the vill, who may either carry him to the common gaol, *vide* 4 E. 3. cap. 10. or to a justice of peace to be examined, and farther proceeded against as case shall require. 10 E. 4. (u) 17. b.

3. Or he may carry him immediately to any justice of peace of the county where he is taken, who upon examination may discharge, bail, or commit him, as the case shall require.

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And

(u) This is the same year with 49 H. 6. and is so printed in the year-book.

And the bringing the offender either by the constable or private person to a justice of peace is most usual and safe, because a gaoler will expect a *Mittimus* for his warrant of detaining.

And thus far of arrests.

C H A P. LI.

Of felony by voluntary escapes, and touching felony by escapes of felons.

HAVING in the former chapter said somewhat of arrests, it remains that somewhat be said touching those felonies, that relate to the escape of persons arrested or imprisoned.

And these escapes, are of three kinds, 1. By the person that hath the felon in his custody, and this is properly an escape; and 2. When the escape is caused by a stranger, and this is ordinarily called a rescue of a felon. 3. By the party himself, which is of two kinds, *viz.* 1. Without any act of force, and this is a simple escape, 2. With an act of force, *viz.* by breach of prison.

As to the *first* touching an escape suffered by the person, that hath a felon in custody, which is properly an escape; and this is of two kinds, voluntary or negligent.

And *first* concerning the *voluntary escape*.

A voluntary escape is when any person having a felon lawfully in his custody voluntarily permits him to escape from it or go at large, and this is felony in case the person be imprisoned for felony, and treason in case the person be imprisoned

found for treason, for the latter enough hath been said before ; touching the former in this place.

And altho Mr. *Stamford*, *Lib. I. cap. 26, 27, 28, 29, 30, 31.* hath collected almost all that can be well said in this case, yet I shall proceed distinctly herein.

And therein I shall as near as I can observe this order.

1. I shall consider who shall be said a felon, whose escape makes a felony in him, that voluntarily suffers it. 2. What shall be said a having of such a felon in his custody. 3. Who shall be said a person lawfully having such a felon in his custody. 4. What shall be said a voluntary escape of such a felon out of his custody. 5. Who shall be said voluntarily to suffer such a felon to escape. 6. What is the offense of such a voluntary permission of an escape, and where, and how punishable.

And tho I apply these particulars to a voluntary escape, yet many of them are applicable unto and useful for the learning of a negligent escape.

I. Who shall be said a felon, whose voluntary escape is felony in him that so permits it.

If *A.* give *B.* a mortal wound, and before *B.* die the constable takes *A.* into custody either with or without a justice's warrant, and then lets him voluntarily escape before *B.* is dead, and then *B.* dies, tho as between *A.* and *B.* or *A.* and the king, this is a felony from the stroke given, and the attainder of *A.* as to the forfeiture of his lands relates to the stroke, yet this is no felony in the constable, but only a misdemeanor punishable by fine and imprisonment. 11 *H. 4. 12. b. Plowd. Com. 258. b.*

If *A.* be indicted for felony, and taken by *Capias*, or by the warrant of a justice, or by the constable, &c. and committed to prison, and the gaoler suffer *A.* to escape voluntarily, this is the escape of a felon, tho *A.* be not attainted at the time of the escape, but the gaoler shall not be arraigned thereupon till after the attainder of *A. de quo infra.*

If a felony be in fact committed, and the constable takes *A.* upon suspicion of felony, and after voluntarily suffers him to go at large, tho *A.* be not then indicted, yet this is a felonious escape

escape in the constable, tho 42 *Affiz.* 5. be otherwise (a), yet 44 *Affiz.* 12. *Dy.* 99. a. 43 *E.* 3. 36. a. accord. (b)

And altho the constable be well assured after the arrest by him made, that *A.* was not the person that did it, yet he may not by the law discharge him, but must bring him before a justice, who may upon due circumstances discharge, bail, or commit him, as he sees cause; but the constable, if he discharge him, is finable.

But if the constable after the arrest finds certainly, that there was no felony committed, it is held he may discharge him both without danger of felony, (which is true,) and without any danger of fine and imprisonment, 13 *H.* 7. *Kelm.* 34. a. b. but then it is at his peril, if in truth there were a felony committed, and the party be guilty; *sed de his vide infra Dalt. cap.* 106. p. 271. accords. (c)

If *A.* be committed for petit larciny, and so it appear by the charge of his *Mittimus*, and the gaoler let him at large, this is a contempt, for which he shall be fined, but not felony in the gaoler; so if he were convicted of petit larciny before the escape. *Stamf. P. C. Lib. I. cap.* 27. p. 33. b. 8 *E.* 2. *Coron.* 430.

So if a man be originally committed for manslaughter *per infortunium* or *se defendendo*, or were convicted only *se defendendo* or *per infortunium*, and afterwards the gaoler suffer him voluntarily to escape, it is no felony; but if the commitment or indictment were for manslaughter, tho in truth it were but *se defendendo*, yet *primâ facie* a voluntary escape is indictable as felony, tho *in eventu* it may fall out otherwise; *de quo infra.*

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If

(a) That was the case of a negligent (not a voluntary) escape, and for that reason could not be felony, tho it is there given as a reason, why it should not be adjudged an escape, because the thief was not taken with the *mainouvre*, nor at the suit of the party, nor indicted of felony.

(b) This case is plainly the same with 44 *Affiz.* 12. and seems to be the case of a voluntary escape; it does not report

any resolution of the court, but only says, that the bailiffs, who let the thief go, altho he were not indicted, were charged with an escape; and a *quære* is added at the end of the case: And as to the case in *Dyer*, that was not the case of the person arresting letting the thief go, but of a third person's rescuing him, and that is said to be felony, altho he was not indicted. See 1 *E.* 5. 16. b.

(c) *New Edit.* p. 511.

If *A.* be indicted of murder for the death of *B.* and pardoned or acquitted within the year, but left in gaol till the year be elapsed upon the statute of 3 *H. 7. cap. 1.* that the wife may bring her appeal if she please, and after that acquittal and within the year the gaoler suffer him voluntarily to escape, it is felony *primâ facie*, and the gaoler may be indicted for it as felony; but if the wife bring not her appeal within the year, or bringing her appeal *A.* is acquitted, the gaoler ought to be acquitted: *vide infra Plowd. Com. 476. b.*

If *A.* commit felony, and being convicted prays his clergy, and the court take time to advise upon it till another sessions, and in the mean time he is left in gaol, as he ought to be, and the gaoler voluntarily suffer him to make his escape, this is felony in the gaoler, for such a prisoner stands yet under a conviction of felony, and therefore is not by law bailable, but if the felon be retaken and hath his clergy, the felony in the escape is purged, and the gaoler is not indictable after, or if indicted before the clergy allowed, he is to be acquitted.

If *A.* be indicted of felony, and hath his clergy, but is continued for six months in custody for his farther correction, according to the power given by the statute of 18 *Eliz. cap. 7.* and the gaoler suffer him to escape voluntarily, it is a misdemeanor punishable by fine and imprisonment, but no felony.

If a man be deliverd to the ordinary as a clerk convict upon his own confession, or as a clerk attaind, in which cases he ought not to be admitted to purgation, and the ordinary notwithstanding admit him to his purgation, and set him at large, this at common law had been a misdemeanor fineable, but it seems it had not been felony in the ordinary, for in those times there was a pretension, that a clerk was not within the temporal jurisdiction; but the law concerning purgation is alterd since by the statute of 18 *Eliz. cap. 7.* and other statutes; *de quo infra 21 Assiz. 12. 9 E. 4. 28.*

Thus far what shall be said a felony.

II. What shall be said to be a having in custody.

Every man is bound by law to pursue and take a felon, and if he make not pursuit, he is fineable.

But if *A.* commit a felony in the presence of *B.* and *B.* never takes him nor attempts it, this is not felony in *B.* for *B.* had him not in his custody.

So it is if *A.* commits a felony, and *B.* receives him knowing him to be a felon, and then *B.* voluntarily suffers him to depart, tho the receipt makes him accessory after, yet it is no escape by *B.* because he never arrested him, and so had him not in custody. 9 *H.* 4. 1. (*d*)

If *A.* being acquit of felony judgment is given, that he shall go free paying his fees, tho the gaoler lets him go before fees paid, it is not felony, for by that judgment he is no longer in custody as a felon. 21 *H.* 7. 17.

If the constable arrest a man for felony, and bring him to the gaol, and the gaoler refuse to receive him, yet in law he is in the custody of the constable, and if he lets him go, he is chargeable in an escape. 10 *H.* 4. 7. *a.* *Escape* 2.

If *A.* have a franchise to have the custody of felons in his gaol [for three days] (*e*), and then to deliver over to the sheriff or county-gaol, and after the three days he offers him to the county-gaol, and the gaoler do not receive him, he yet remains a prisoner to *A.* and if he suffer a voluntary escape it is felony, 27 *Affiz.* 27. yet in both these cases the gaoler is punishable for not receiving the felon by 4 *E.* 3. *cap.* 10.

If *A.* arrest *B.* of felony, and deliver him to the constable or to the vill, and they receive him, *A.* is discharged of the custody, and the escape after is chargeable upon the constable or vill, and if the constable or vill deliver him to the sheriff or his gaoler, and he receive him, the constable and vill are discharged of the custody, and the sheriff or gaoler is chargeable with the escape after. 3 *E.* 3. *Coron.* 322, 337.

As touching escapes without arrests they belong not to this title of voluntary escapes; *sed hæc vide infra & supra.*

If *A.* the sheriff of *B.* hath a felon in gaol, and then *C.* is made sheriff, till the prisoner be turned over by indenture to the new sheriff, the custody of him remains in *A.* and he or his

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(*d*) 24. *b.*(*e*) These words are not in the original *MS.* but yet are plainly supposed inthe argument, and are mention'd in the case here quoted by our author, *viz.* 27 *Affiz.* 27.

his gaoler is chargeable for a negligent escape, and his gaoler chargeable for a voluntary escape.

If the bailiff of a franchise, that hath a gaol, hath the custody of a felon, he is chargeable for his escape, and not the sheriff or his gaoler.

III. Who shall be said a person lawfully having the custody of a felon: this hath been touched in the former section, but now shall be farther prosecuted.

If *A.* a meer private man knows *B.* to have committed a felony, he may thereupon arrest him of felony, and he is lawfully in the custody of *A.* till he be discharged of him by delivering him to the constable or common gaol; and therefore if he voluntarily suffer him to escape out of his custody, tho he were no officer, nor *B.* indicted, it is felony in *A.*

So it is if a felony be in fact committed, and *A.* hath a probable cause to suspect *B.* and accordingly suspects and arrests him, *B.* is lawfully in the custody of *A.* for suspicion of felony; and if he voluntarily lets him escape, it is felony in *A.* *in eventu, viz.* if *B.* prove really guilty of the felony.

And accordingly if *A.* deliver the party so arrested to the constable's custody, he is lawfully in his custody, and if he suffer the escape voluntarily, it is felony *in eventu.* 44
Assiz. 12.

If a justice of peace make a *Mittimus* to the gaoler for felony with an unapt conclusion, as *till the justice give order for his delivery*, whereas it should be *till he be deliverd by due course of law*, tho this warrant be not formal, yet the felon is lawfully in his custody, and if he let him voluntarily escape, it is felony, for he is sufficiently ascertained of the crime with which he is charged.

And it seems to me, if the *Mittimus* be general and contain no certain cause, tho the gaoler is not bound to receive him upon such a *Mittimus*, yet if he be acquainted what the crime is, for which he is committed, if he suffer him voluntarily to escape, it is felony.

For if a private person or a constable arrest a man for felony, and carry him to the common gaol, (as he may do by law, 13 E. 4. 9. and the gaoler is bound to receive him by the
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the statute (*f*) of 4 E. 3. *cap.* 10.) if the constable or person, that delivers him, acquaints the gaoler it is for felony, it is at the peril of the gaoler if he lets him escape, and yet there is no *Mittimus* in that case, but a notice *ore tenus*.

The stocks is the prison of the constable, and so long as he is in the stocks he is in the constable's custody, and therefore if the constable wilfully let a felon escape out of the stocks and go at large, it is felony in the constable, unless it be to bring him to a justice, or to a safer or more convenient custody.

IV. What shall be said a voluntary escape of a felon in custody, for it must be a *voluntary* escape to make felony.

If the prisoner be rescued, or rescue himself against the will of him, that hath him in custody, this is no voluntary escape, nor is the gaoler, &c. punishable for the same.

If the prison be fired, and the gaoler lets out the prisoners, there being no other means to save their lives, and uses the best means he can by his officers and irons to keep them safe, and this without fraud, or if enemies force him to open the prison doors, and he doth it to save his life, it excuseth from felony.

And if it be done by rebels, tho' this excuse not the gaoler or sheriff in civil actions, but he is liable to an action of debt or upon the case for the escape, because the sheriff hath his remedy over, yet it excuseth the gaoler from felony and also from a fine, if it be *vis major, quam cui resisti potest*.

If a justice of peace bail a person not bailable by law, it excuseth the gaoler, and it is not felony in the justice, but a negligent escape, for which he is fineable at common law, 25 E. 3. 39. (*g*), and by the justices of gaol-delivery by the statute of 1 & 2 P. & M. *cap.* 13.

And the like in case of a sheriff, under-sheriff, constable, bailiff of a liberty bailing one, that is not by law bailable, it is not a voluntary escape, at least unless done by design to deliver the prisoner for ever, but it is a negligent escape pun-

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nishable

(*f*) This statute obliges the gaoler to receive felons by the delivery of the constables or townships, but says nothing as to the delivery by private persons.

(*g*) In the last edition of the year-books, which is in this place mispaged, it is 25 E. 3. 82. *a*.

nishable at common law, or according to the statute of 3 E. 1. *cap.* 15. by loss of office, fine, and three years imprisonment.

And therefore I think, that if a justice of peace bail a person, that confesseth a felony before him, it is no voluntary escape, but fineable as above, for it is *error scientiæ*, 2 R. 3. 10. contrary to the opinion of *Crompt.* 39. *a.* *Dalt.* p. 276. (b)

If a gaoler voluntarily licence a felon to wander out of the bounds of the prison and to return again, if the prisoner return again to the gaol before the gaoler be indicted, so as he be in custody, it is held by some this will not excuse a voluntary escape as to the point of felony, but certain it is that it is punishable as a misdemeanor, and if he had never returned, it had been such an escape, as would have been felony, tho perchance the licence were special to go out and come in at night. 22 E. 3. *Coron.* 242. 8 E. 2. *Coron.* 431. because he cannot apportion his own wrong and breach of duty.

V. In whom the voluntary escape shall be.

In all civil causes the sheriff is to be responsible, or the gaoler at election, as if the gaoler, or bailiff of a sheriff suffer either voluntarily or negligently an escape of a person imprisoned for debt, the sheriff is chargeable with an action upon the escape, for the gaoler or bailiff is the sheriff's officer or minister, and gives him security. 14 E. 3. *cap.* 10. 19 H. 7. *cap.* 10.

But if the gaoler being placed there by the sheriff voluntarily suffer a felon in his custody to escape, this in as much as it reacheth to life is felony only in the gaoler, that was immediately trusted with the custody, not in the sheriff.

But whether the escape was voluntary or negligent, yet the sheriff may be indicted for it so as to subject him to a great fine and imprisonment for the offense of his gaoler, tho not to make him guilty of felony. *Dalt.* *cap.* 106. p. 273. (i), *Doctor and Student* 42. (k)

For the escape must be voluntarily permitted in him that permitted it, which could not be in the high sheriff, tho it were such in the gaoler, for he was not privy to it, and

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therefore

(b) *New Edit.* p. 512. (i) *New Edit.* p. 509. (k) *Dialog.* 2. *cap.* 42.

therefore could not do it *felonicè*, but it was a negligent escape in him in trusting such a person with the custody of his prisoners, that would be false to his trust, and therefore the sheriff shall pay, but not corporally suffer for the miscarriage of his gaoler.

But if the gaoler were a gaoler in fee, as antiently constables of castles were, the sheriff should not answer in any kind for the default of such gaoler or constable; but now by the statutes of 14 E. 3. *cap.* 10. and 19 H. 7. *cap.* 10. gaols of counties are rejoined to the counties.

But for escapes committed by gaolers of gaols in particular franchises, as the *Gate-house* at *Westminster* belonging to the dean and chapter of *Westminster*, escapes there permitted concern not the sheriff, but the particular gaoler and lord of the franchise.

VI. How and in what manner, and before whom felonious escapes shall be determined, tried and adjudged.

It is to be known, that I may say it once for all, altho the felony for breaking of prison may be heard, tried and determined before the felony, for which he was committed, as shall be said; yet in case of a felony for the wilful escape or rescue of a person committed to prison for felony, tho the party, that voluntarily permits such escape or rescues the prisoner, may be indicted for these offenses as felonies before the principal felony in him, that escapes or is rescued, be tried, yet he shall not be arraigned or put upon his trial, till the principal be convicted or attainted; and the reason is, because possibly the person escaping may be found not guilty, or if guilty, yet of such a fact as is not capital, as of petit larciny, *se defendendo*, *per infortunium*, in which case the rescuer or officer ought to be discharged: nay, if the principal person be only convicted and not attaint, but hath his clergy, I think the gaoler or rescuer shall never be put to answer to the escape or rescue, but be discharged, as the accessory, where the principal hath his clergy, shall be discharged thereby, for the rescuer and officer, that permits the escape, are a kind of accessaries.

But in these cases the gaoler or rescuer may be fined and imprisoned for their misdemeanor, but shall not be charged with felony, where the principal is discharged. *2 Co. Instit. p. 592.*

Again, it is to be remembered, that there is a voluntary escape before indictment, and a voluntary escape of a party indicted of felony.

1. If the party that escapes were not indicted at the time of the escape voluntarily permitted, the indictment of the gaoler (and so in case of a rescue) ought to surmise, that *de facto* a felony was committed, and that the person escaping was imprisoned for that felony or suspicion of it.

And I need not say this must be proved upon the evidence against the gaoler, for, as I said before, the gaoler cannot be arraigned till the principal be attainted by verdict, confession, or outlawry, and the record of such attainder must be shewed or proved.

2. But if the party that escaped were indicted, and so taken by *Capias*, and then escape, tho, as I said before, the gaoler or rescuer cannot be arraigned and tried till the principal be attainted, yet the indictment for the escape or rescue need not surmise a felony done, but only recite the substance of the indictment against him that escapes. *1 E. 3. 16. b. 2 E. 3. Coron. 158.*

And the like law is in case of felony for breach of prison. *2 Co. Instit. p. 590.*

Again it is to be known, that as to the voluntary suffering of an escape or rescuing of a felon, tho the felony be not within clergy, yet the escape or rescue are within clergy, and tho the prisoner were indicted or attainted of several felonies, yet the escape or rescue of such a prisoner makes but one felony, and he shall be indicted but of one escape; but if *A.* and *B.* be indicted of one felony, and the gaoler voluntarily suffer both to escape, the gaoler may be indicted severally for both.

The means of bringing an officer to judgment cannot be barely by the calling of the record of the prisoners over, as is usually done in the king's bench, because tho this may be a sufficient cause to convict of a negligent escape, yet it cannot appear thereby, that it is voluntary; the marshal or
gaoler

gaoler may be fined upon a record thereof made, but he cannot be convict of a felony, 39 H. 6. 33. but there must be an indictment or presentment of the felonious and voluntary escape.

And tho by the statute of *Westm. 1. cap. 3. (1)* amercements upon the country for the escapes of felons cannot be set but by the justices in *Eyre*, or by the king's bench. 21 *Affiz. 12. 27 Affiz. 27.* or, as it seems, by justices of general *oyer and terminer*; yet the hearing and determining of escapes is at this day within the jurisdiction of justices of peace, or any other justices, by the statutes of 1 R. 3. *cap. 3.* 31 E. 3. *cap. 14.*

And thus far concerning voluntary escapes of felons, where it is felony and where not.

In the next chapter I shall say something concerning negligent escapes, tho this hath been before *cap. 50* in part handled.

C H A P. LII.

Touching negligent escapes.

Negligent escapes of felons are not felony, but punishable by fine upon the parties, that suffer them.

These negligent escapes are of two kinds, 1. By an officer or some particular person or persons, that hath a felon in custody, 2. Or by vills or townships, whether the felon be taken and in custody, or not taken.

I. First as to negligent escapes by officers or particular persons these things are considerable.

1. What shall be said a negligent escape. 2. What the conviction of such negligent escape. 3. What the punishment of it, and by whom.

1. As to the first of these, what shall be said a negligent escape hath been partly before described, only some things I shall add.

If a prisoner for felony break the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol, that should have secured him, or that due vigilance in the gaoler or his officers to have prevented it, and therefore it is by law lawful for the gaoler to hamper them with irons to prevent their escape (*a*), and if this should not be construed a negligent escape, gaolers would be careless either to secure their prisoners, or to retake them that escape, if he should in such a case be exempt from pecuniary punishment; and we see by daily experience in civil cases of men in execution or arrested for debt, if they break prison, the sheriff is chargeable.

But if a private person arrest a felon, and he escape by force from him without any default in him, tho the township shall be amerced, as shall be said, yet it seems it excuseth the party, for he being a private person cannot raise power to take or detain a felon.

But if a sheriff, bailiff, constable, or other officer hath the custody of a prisoner bringing him to the gaol, it seems that a simple escape by the rescue of the prisoner himself doth not excuse him *a toto*, though it may *a tanto*, because he may take sufficient strength to his assistance; but if he be rescued before he be brought to gaol, *quare*, whether it be not an excuse of an escape, as in case where a man is arrested upon a mesne process, and in carrying to gaol be rescued, the return of the rescue excuseth the sheriff, 39 *Eliz. C. B. Croke, n. 22. Conyer's case*; but it is no excuse if he be taken in execution

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(*a*) And therefore this liberty can only be intended, where the officer has just reason to fear an escape, as where the prisoner is unruly or makes any attempt to that purpose, but otherwise, notwithstanding the common practice of gaolers, it seems altogether unwarrantable, and contrary to the mildness and humanity of the laws of *England*, by which gaolers are forbid to put their prisoners to any pain or torment; see *Co. P. C. p. 34 & 35. Custodes gaolarum pœnam sibi commissis*

non augeant, nec eos torqueant vel redimant, sed omni severità remotâ pietateque adhibitâ judicia debite exequantur, Flet. Lib. 1. cap. 26. and the Mirror of Justices, cap. 5. §. 1. n. 54. says, It is an abuse that prisoners should be charged with irons, or put to any pain before they be attainted of felony; and lord Coke in his comment on the statute of Westm. 2. cap. 11. is express, that by the common law it might not be done. 2 Instit. 381.

execution and rescued, for there the sheriff shall be answerable notwithstanding the rescue, but it seems the rescue is no excuse in case of felony. 3 E. 3. *Coron.* 328, 337. (b)

And upon the same reason it is, that if a felon be attaint and be carried to execution, and be rescued from the sheriff, the sheriff is punishable notwithstanding the rescue, for there is judgment given, and the sheriff should have taken sufficient power with him, and therefore in that case the township is not fineable: *vide* 27 *Affiz.* 54.

If a prisoner for felony be in gaol and escape, and the gaoler pursue after him, he may take him seven years after, tho he were out of his view, 13 E. 4. 9. a. 14 H. 7. 1. a. but that will not excuse the gaoler from a negligent escape, tho it may excuse *a tanto*; for if the gaoler hath once lost the view of his prisoner, tho he take him after, it is an escape, but if he retake him upon a fresh pursuit, and hath still the view of him, it is no escape, nor punishable. 8 E. 2. *Coron.* 400. 22 E. 3. *Coron.* 236. M. 28 E. 3. *Rot.* 32. *Rex. Hertf. Casus Abbatis Sancti Albani.* M. 45 E. 3. *Rot.* 17. *in dorf. Rex. Essex.*

But if a man be arrested for felony, and in bringing to gaol by the sheriff's bailiff or constable he makes his escape, and they follow him and keep the view of him, but cannot take him without killing him, whereby he is kild in the pursuit, yet the sheriff or constable, or township, that let him escape, shall be fined for the escape, because tho the party be kild in the fresh pursuit, he cannot now be brought to judgment, and yet by his flight, if presented by the coroner, he forfeits his goods. 3 E. 3. *Coron.* 328 and 346.

If a felon escape out of the gaol by negligence, tho the gaoler be fined for it, he may retake the felon at any time after, for the felon shall not take the advantage of his own wrong, or the gaoler's punishment, but his retaking shall not discharge the gaoler's fine, and so is the book to be intended.

13 E. 4. 9. a.

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2. Touch-

(b) These cases, as also *Coniers's* case here mentioned, prove nothing particularly as to a rescue, but only in general, that a sheriff shall be liable in case of an escape.

2. Touching the conviction of a negligent escape.

The proper way of conviction is by presentment and trial thereupon.

Yet where the prisoners be of record in a court, if the gaoler being called cannot give an account where a prisoner is, this is a conviction of an escape, but seems not to be presently a conviction of a *voluntary* escape, unless the gaoler confesses it: *vide* 27 H. 6. 7. 39 H. 6. 33. so in some cases the coroner's roll is a conviction of an escape, *vide* 3 E. 3. Coron. 352. so if the dozers present a felon taken and deliverd to the sheriff by the vill, but shew not what sheriff. 3 E. 3. Coron. 345. (c)

Where an officer is to be charged either with a voluntary or negligent escape, the bare presentment of the escape by the grand inquest or the dozers in *Eyre*, or upon a commission of *Oyer and Terminer*, or in the king's bench, is not alone sufficient to convict the officer, because upon his conviction, tho' but of a negligent escape, he is to be fined.

But if the dozers in *Eyre* or in the king's bench present the escape of a felon, whereby the vill is to be amerced, because this is but an amercement, and the justices may [not in this case (d)] set a fine but an amercement, *de minimis non curat lex*, and therefore the presentment is not traversable: *vide* 3 E. 3. Coron. 291. & *ibidem* 3 E. 3. Coron. 328, 346. *Stamf. P. C. Lib. I. cap. 33. fol. 35. b.*

An escape is presentable in a leet, but they cannot set a common fine or amercement there, but it ought to be sent to the next *Eyre* &c. or may be removed into the king's bench by *Certiorari*, and there the common fine or amercement set; and this by the statute of *Westm. 1. cap. 3.*

3. As to the punishment of a negligent escape by an officer or other that hath the felon in custody, it is by fine and imprisonment. If

(c) The words of the book are,
" When the dozen present, that a felon
" is taken for felony and deliverd to the
" sheriff, they adjudge it for an escape
" in *Eyre*, if they do not say to what
" sheriff by name, for a man may inquire
" his rolls to see whence the prisoner
" comes, &c. and if they do not find in

" the sheriff's roll, that he was charged
" with him, or if they do not find how
" he got out of his custody according to
" the law of the land, it shall be ad-
" judged an escape in the sheriff.

(d) These words are wanting in the *MS.* but the sense of the place seems plainly to require them.

If the felon be attainted it is said, that the fine is to be an hundred pounds, and if he be only indicted, then an hundred shillings, *Stamf. P. C. p. 35.* but the fine in truth is more or less according to the quality of the offense, and sometimes of the offender: *vide 3 E. 3. Coron. 370.* a bishop fined one hundred pounds for an escape.

Ci. in Scaccario M. 36 E. 3. n. 5. The constable of a castle under the duke of *Lancaster* permitted a negligent escape; It was ruled 1. That in default of the constable the duke of *Lancaster*, that put him in, should be fined. 2. That tho the duke were dead, yet his executors should be fined (e), and they were fined five pounds for negligent escape.

II. I come to those fines, that are for escapes of felons either before or sometimes after arrest.

And this is that, which is set upon vills, towns, cities, and sometimes upon hundreds and counties, and is usually called *escapium*, and those, that have franchises to be quit *de murdro, latrocinio, escapiis*, are intended of those common fines set upon vills or hundreds for those offenses, and then he, that hath such a liberty granted by the king to be quit *de escapiis*, hath a discharge for the rate or portion of such a common fine or amercement, that comes to his share; and this franchise or liberty generally granted to be quit *de escapiis* extends not to voluntary escapes by officers or others, but as I said, to the rate or portion chargeable upon them by such common fine or amercement for negligent escapes.

If a murder, manslaughter or killing of a man *se defendendo* be committed in a vill not inclosed in the day-time, and the murderer, &c. be not taken, the vill shall be amerced, altho it be done after sun-set, before day-light be gone. *22 E. 3. Coron. 238. 3 E. 3. Coron. 293, 302. 3 H. 7. cap. 1.*

And if the murder be committed in a town enclosed in the day or night, and the murderer or manslayer escape, the town shall be amerced, because by the statute of *Winchester* they ought to keep their gates shut from sunset to sunrise: *3 E. 3. Coron. 299. 3 H. 7. cap. 1.*

(e) See 2 Co. *Instit.* 382.

If a felony be committed in a vill, and they take the felon and commit him to four men to carry him to gaol, and they suffer him to escape, the vill shall be amerced. 3 E. 3. *Coron.* 346.

If a felony be committed in a vill, and the felon taken by them of the vill, and he escape from them to the church of the same vill, and from thence before abjuration he escapes again, the vill shall be amerced for two escapes at common law, for they should have kept him in the church till abjuration, &c. 8 E. 2. *Coron.* 422.

But if a person attaint, as they are carrying him to execution, escape to a church, and from thence make an escape, the vill were not amerceable, because he could not abjure being attaint, and therefore the vill were not bound to watch him, 27 *Affiz.* 54. *vide Rot. Parl.* 45 E. 3. n. 25. 50 E. 3. n. 183. But now abjuration and sanctuary are ousted (f), and with it much of this old learning of escapes is antiquated.

If a prisoner for suspicion of felony be brought to the hundred-court, and the court grant him liberty to seek his voucher or warrant, and he escape, the hundred shall be amerced. 3 E. 3. *Coron.* 316. and so it is if a manslaughter be committed out of any vill. *Stamf. P. C.* 34. a.

If the vill answer not the amercement for an escape, the hundred shall be distrained, and if the hundred answer not, the county shall be charged therewith and distrained. *Stamf. P. C.* p. 34. b.

And thus far touching escapes both voluntary and negligent.

C H A P. LIII.

Concerning rescues of prisoners in custody for felony.

Rescue of a person imprisoned for felony is also felony by the common law.

To make a rescue a felony, 1. It is necessary that the felon be *in custody, or under arrest* for felony, and therefore if *A.* hinder an arrest, whereby the felon escapes, the township shall be amerced for the escape, and *A.* shall be fined for the hindrance of his taking; but it is not felony in *A.* because the felon was not taken. 3 E. 3. *Coron.* 333. *Stamf. P. C. p. 31. a.*

2. Again, to make a rescue felony the party rescued must be under custody *for felony or suspicion of felony*, and it is all one, whether he be in custody for that account by a private person, or by an officer or warrant of a justice, for where the arrest of a felon is lawful, the rescue of him is a felony.

It seems that it is necessary, that he should have knowledge that the person is under arrest for felony, if he be in the custody of a private person.

But if he be in the custody of an officer as constable or sheriff, there at his peril he is to take notice of it, and so it is if there be felons in a prison, and *A.* not knowing of it breaks the prison and lets out the prisoners, tho he knew not that there were felons there, it is felony, and if traitors were there, it is treason. P. 16 *Car.* 1. *Croke, p. 583. Bensted's case per omnes justiciarios.*

A return of a rescue of a felon by the sheriff against *A.* is not sufficient to put him to answer for it as a felony without indictment or presentment by the statute of 25. E. 3. *cap. 4. 1 H. 7. 6. a. per curiam, 2 E. 3. 1. Coron. 149.*

As in case of an escape, so in case of a rescue, if the party rescued be imprisoned for felony, and be rescued before indictment; the indictment must surmise a felony done as well as an imprisonment for felony or suspicion thereof; but if the party be indicted and taken by a *Capias* and rescued, then there needs only a recital that he was indicted *prout*; and taken and rescued.

But tho the rescuer may be indicted before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal be attaint for the reason given, *cap. 51.*

The rescuer of a prisoner for felony, tho not within clergy, yet shall have his clergy.

Vide plus capite proximo, for many things there said are applicable to the case of a rescue.

C H A P. LIV.

Concerning escapes and breach of prison
by the party himself that is imprisoned
for felony.

AT common law it was held, that if any imprisoned for a misdemeanor, tho not felony, had broke the prison and escaped, it had been felony. *Bract. Lib. II. (a)*, *Stamf. P. C. p. 30. b.* *2 Co. Instit. p. 589. (b)*

But

(a) This should be *Lib. III. tract. 2. de Corona, cap. 9. f. 124. a.* in this place *Bracton* carries the matter very far, for he says, tho the party were innocent, and had only conspired to escape, he was *ultimo supplicio puniendus*.

(b) But this severity is complained of as an abuse, *Mirror, cap. 5. §. 1.* and it

was the opinion of *Billing* chief justice and the rest of the judges, *1 H. 7. 6. a.* that a rescue of a felon was felony at common law, but not in the person himself, till the statute of *1 E. 2.* this lord *Coke* says must be intended, where others break the prison without his privity. *2 Inst. 589.*

But by the statute of 1 E. 2. *de frangentibus prisonam* the severity of the common law is moderated; *viz.* *Nullus de cætero, qui prisonam fregerit, subeat iudicium vitæ vel membrorum pro fractione prisonæ tantum, nisi causa, pro quâ captus & imprisonatus fuerit, tale iudicium requirit, si de illâ secundum legem & consuetudinem terræ fuerit convictus, licet temporibus præteritis aliter fieri consuevit.*

Upon this statute therefore to make a felony by breach of prison these things must concur: 1. The party must be in prison. 2. He must be in prison for felony. 3. He must break that prison. Many of these things have been discussed before. I shall resume and add what shall be necessary for the explication of this felony.

I. What is a prison, and who shall be said a person in prison.

If a man be imprisond for felony in the prison of a franchise, and breaks and escapes, this is a breaker of prison, and it is as to this purpose the king's prison (c), tho the franchise or profit be the lord's. 2 E. 3. 1 Coron. 149. *Stamf. P. C.* 31. a. 2 *Co. Instit.* 589.

So at common law when sanctuary was in use, if a felon had escaped to a church, and there had been watched by the vill where the church is, and he had broken the church and escaped, this had been a felony within this statute. *Stamf. P. C.* p. 30. b. 3 E. 3. *Coron.* 290.

Whether the breach of the prison of the ordinary by a clerk convict or attaint before purgation had been felony, *vide Stamf. P. C.* p. 31, 32. but that learning is now antiquated, because by the statute of 18 *Eliz. cap.* 7. the prisoner is not now deliverd to the ordinary; and therefore I shall not farther examine it.

(c) *Stamford* in the place here mentioned thinks it is not the king's prison, and therefore at common law the breaking of it would not be felony, but by the statute of 1 E. 2. it matters not, whether it be the king's prison or no, for it speaks *de prisona* generally, and not

de prisona nostra; however, as it must be intended a legal prison, which cannot be without a grant from the crown, our author's construction is very reasonable, that all such prisons should be taken as to this purpose to be the king's prisons.

If a person be taken for felony, and put in the stocks and break it, this is a breaking of prison, and felony within the law. *Dy. 99. a. 2 Co. Inst. 589. Stamf. P. C. p. 30. b.*

So it is if the constable or any other secure a felon in the house of him that makes the arrest, or in the house of any other, and he break it and escape, it is felony.

Yet farther, if *A.* arrest *B.* for felony or suspicion of felony, there being *de facto* a felony committed, and being in the hands of *A.* he violently rescueth himself and escapeth, this is a breach of prison and a felony, for so are the words of my lord *Coke*, *2 Instit. 589.* “*Nota*, he that is in the “stocks or under lawful arrest is said to be in prison, tho’ “he be not *infra carceris parietes.*” And *Stamford ubi supra p. 30. b.* *Et nota quant a ceo que chescun que est sous arrest pour felony est prisoner auxy bien hors de gaol come deins, issint que sil soit lorsque in cippes in le haut street ou hors de cippes in le possession d’ascun, que lui aver arrest, & fait escape, ceo est de brusement de prison in le prisoner*, which must be intended, as it seems, of a violent escape, *viz.* rescuing himself out of custody.

II. What shall be said a being in prison for such a cause, as requires *judicium vite vel membrorum.*

It seems it is intended only of capital offenses, as felony, and therefore if a man be committed for petit larciny or homicidè *se defendendo* or *per infortunium* and break prison, this is not felony, for the principal offense *non requirit tale judicium.* *2 Co. Instit. 590.*

But if the commitment express larciny above value or manslaughter, tho’ *de facto* it were but petit larciny, or *per infortunium* or *se defendendo*, and possibly would appear so upon the evidence, yet this escape will be felony.

Touching my lord *Coke’s* opinion of the form of the *Mittimus*, that it must particularly express the nature of the felony, and must have an apt conclusion I have said enough before; I think it is sufficient if it be generally for felony, altho’ it want that regular conclusion, (*till he be deliverd by due course of law*), yet these defaults will not excuse the breach of prison from felony, but possibly if it express no cause, the

case may be otherwise, because the substance of the *Mittimus* must be recited in the indictment.

For it is very plain, that antiently there were more felons committed to the common gaol without *Mittimus* in writing than were with it; such were all the commitments by constables, watchmen, and private persons arresting for felony and bringing to the common gaol, and *Mittimus's* were not of so antient a date as justices of peace, and they were not before 1 E. 3. (d), and yet breach of prison by felons was felony even from 2 E. 1. and not only from 1 E. 2.

It is therefore enough if the gaoler have a sufficient notification of the nature of the offense, for which he was committed, and the prisoner of the offense, whereof he was arrested, and commonly they know their own guilt, if they are guilty, without much notification.

And again by what hath been said breach of prison is not only, where the felon is formally committed to gaol by a *Mittimus*, but if he be put in the stocks, kept in the constable's house, nay, under the custody of him that makes the arrest, and he break prison, it is a felony, tho in these cases there neither are nor can be *Mittimus's*.

If *A.* arrest *B.* for suspicion of felony, and carry him to the common gaol, and there deliver him, as he may do, 13 E. 4. 9. a. 4 E. 3. cap. 10. and he break prison, if he be indicted upon it there must be an averment in the indictment, that there was a felony committed, and that *A.* having probable cause did suspect *B.* and arrested him and committed him, and that he broke the prison, and this must be all proved upon the evidence.

But if *B.* be indicted or appealed and taken by *Capias*, and committed and break prison, there needs no averment or proof, that a felony was done, but only, that there was an indictment or appeal, and a *Capias* thereupon, because all appears by matter of record. 2 Co. Instit. 590.

But a lawful commitment may be for suspicion of felony, and this is within this statute, yet no person can be indicted
1
barely

barely of suspicion of felony, but of the felony itself. 43
E. 3. *Coron.* 454. 44 *Affiz.* 12. 2 *Co. Instit.* 592.

If a felony be made by act of parliament subsequent to
1 E. 2. and a person be committed for such a felony and
break prison, yet this is felony. 2 *Co. Instit.* 592.

III. What shall be said a breaking of prison by a person
committed for felony to make a felony.

If the prison be fired by accident, and there be a necessity
to break prison to save his life, this excuseth the felony, but
if the prison were fired by the prisoner himself, or by his
procurement, the breaking to save his life is nevertheless fe-
lony, for it was a necessity of his own creating. 2 *Co. Instit.*
590.

If the gaoler set open the prison doors and the felon e-
scape, this may be a felony in the gaoler; but is no breach
of prison to make felony in the prisoner.

If *A.* be arrested or imprisoned for felony, and *B.* and others
without the consent of *A.* rescue *A.* this is felony in the res-
cuers, but not felony in *A.* but if *A.* were of confederacy
with *B.* to do it, then it is felony in *B.* as a rescue, and in *A.*
as a breach of prison.

And so it is if *B.* had broke the prison doors, and they
being open *A.* had gone away; this had been felony in *B.* but
not felony in *A.* unless it were done by his confederacy or
procurement, for *A.* did not actually break prison. 2 *Co.*
Instit. 589. 1 *H.* 7. 6. a.

IV. Touching the proceeding for felony by breach of
prison.

A. is committed for felony, or suspicion thereof, and breaks
prison, he may be indicted, arraigned, convicted, and have
judgment for the escape, altho the principal felony be not
tried, and he may be not guilty of the felony, and so it dif-
fers from the case of a rescue or escape before, and the rea-
son is; because here it is the same person, there they are di-
vers, and therefore in the latter case the principal felony shall
be first tried. 2 *Co. Instit.* 592.

And yet I hold, that if *A.* be indicted of felony and com-
mitted, and then breaks prison, and then be arraigned of
the

the principal felony and found not guilty, now *A.* shall never be indicted for the breach of prison, or if indicted for it before the acquittal, and then he is acquitted of the principal felony, he may plead that acquittal of the principal felony in bar to the indictment for the felony for breach of prison.

And so it was pleaded by myself in the case of one Mrs. *Samford*, who was severely prosecuted by the earl of *Leicester* upon a suspicion that she had stolen his jewels, for tho' while the principal felony stood untried, it stood indifferent whether she were guilty of the principal felony, or rather the breach of prison was a presumption of the guilt of the principal offense, yet now it be cleared, that she was not guilty of the felony, she is now in law as a person never committed for felony, and so her breach of prison is no felony.

The felony of breach of prison is a felony within clergy, tho' the principal felony for which the party was convicted were out of clergy, as robbery, or murder.

C H A P. LV.

Of principals and accessaries in felony, and first of accessaries before the fact.

HAVING gone through the considerations of the offenses of treasons, and also of felonies at the common law, it will be seasonable in this place to consider of those different relations of principals and accessaries, whereof tho' much hath occasionally been mentiond, yet I shall now proceed to the discussion of this matter distinctly and apart, and shall put together all the learning, that occurs to me concerning this matter.

In the highest capital offense, namely high treason, there are no accessaries neither before nor after, for all consenters, aiders, abettors, and knowing receivers and comforters of traitors are all principals, as hath been said, 3 *H.* 7. 10. *a.* *Stamf. P. C.* p. 40. *a.* *Co. P. C.* p. 20.

But yet as to the course of proceeding it hath been and indeed ought to be the course, that those, who did actually commit the very fact of treason, should be first tried before those, that are principals in the second degree, because otherwise this inconvenience might follow, *viz.* that the principals in the second degree might be convicted, and yet the principals in the first degree may be acquitted, which would be absurd: *vide Somervill's case (a)* before *cap.* 22. p. 238.

In cases that are criminal but not capital, as in trespass; mayhem, or *premunire*, there are no accessaries, for all the accessaries before are in the same degree as principals, *Stamf. Lib. I. cap.* 48. *& libros ibi*; and accessaries after by receiving the offenders cannot be in law under any penalties as accessaries, unless the acts of parliament, that induce those penalties, do expressly extend to receivers or comforters, as some do.

Note, the word *maintainers* in the statute of 27 *E.* 3. *cap.* 1. and 16 *R.* 2. *cap.* 5. denotes the maintainers of the offense, and not (as it seems) of the parties.

It remains therefore, that the business of this title of principal and accessory refers only to felonies, whether by the common law, or by act of parliament.

As to felonies by act of parliament, regularly if an act of parliament enact an offense to be felony, tho it mention nothing of accessaries before or after, yet virtually and consequentially those, that counsel or command the offense, are accessaries before, and those, that knowingly receive the offender, are accessaries after, as in the case of rape made felony by the statute of *Westminst.* 2. *cap.* 34. (*b*), *Stamf. P. C. Lib. I.*

7 R

cap. 47.

(a) 1 *And.* 109. But it was ruled in that case, that upon that branch of treason, which relates to the compassing the death of the king, there is no need that the principal in the first degree, (*viz.* he who undertook to do the act)

should be first tried, for the movers or procurers are guilty of compassing the death of the king, altho he, that was procured, should never assent thereto.

(b) 2 *Co. Inst.* 434.

cap. 47. 11 *H.* 4. 14. in case of multiplication, *Co. P. C. cap.* 20. tho *Dy.* 88. makes it a *quære*.

But if the act of parliament, that makes the felony, in express terms comprehend accessaries before, and make no mention of accessaries after, namely receivers or comforters, there it seems there can be no accessaries after, for the expression of procurers, counsellors, abettors, all which import accessaries before, make it evident, that the law-makers did not intend to include accessaries after, which is an offense of a lower degree than accessaries before, as the statute of 8 *H.* 6. *cap.* 12. for stealing of records, the statute of 33 *H.* 8. *cap.* 8. for witchcraft, &c. *Stamford's P. C. ubi supra.*

It is true my lord Coke, *P. C. cap.* 19. p. 72, 73. denies the opinion of *Stamford*, and affirms, that tho the statute of 8 *H.* 6. *cap.* 12. mention only accessaries before, yet virtually and consequentially accessaries after are included, as well as in felonies at common law; but he neither allegeth any reason or authority for that opinion, and therefore the authorities being equal the greater reason seems to be with *Stamford's* opinion, *Expressum facit cessare tacitum*, and no weight can be laid upon the statute of 3 *H.* 7. *cap.* 2. for that in express terms makes accessaries before and after to stand as principals.

And upon the same reason it is, that many of these acts of parliament mentiond before *cap.* 22. p. 236. that make certain offenses, their counsellors, abettors, and procurers to be treason, do not extend to make receivers guilty of treason, tho if the act had been general, that such an offense shall be treason, it had consequentially made knowing receivers, as well as abettors, guilty of treason: *vide Co. P. C. cap.* 64. p. 138.

Tho generally an act of parliament creating a felony renders consequentially accessaries before and after within the same penalty, yet the special penning of the act of parliament in such cases sometimes varies the case.

The statute of 3 *H.* 7. *cap.* 2. for taking away maidens, &c. makes the offender, and the procuring and abetting, yea and wittingly receiving also to be all equally principal felonies, and excluded of clergy.

Again, the statute of 27 *Eliz. cap. 2.* makes the coming in of a jesuit treason, the receiving or relieving of him felony, the contributing of money to his relief a *præmunire*, so that acts of parliament may diversify the offenses of accessory or principal according to the various penning thereof, and so have done in many cases.

And thus much as to accessaries to felonies made by act of parliament, which being general directions may be applicable almost to all cases.

I come to consider of principals and accessaries in felony, and their differences among themselves, and with relation to felonies at common law.

By what hath been formerly deliverd principals are in two kinds, principals in the first degree, which actually commit the offense, principals in the second degree, which are present, aiding, and abetting of the fact to be done.

So that regularly no man can be a principal in felony, unless he be present, unless it be in case of wilful poisoning, wherein he, that layeth or infuseth poison with intent to poison any person, and the person intended or any other take it in the absence of him that so layeth it, yet he is a principal, and he, that counselleth or abetteth him so to do, is accessory before. *Co. P. C. cap. 64. p. 138.*

Who shall be said present, aiding and abetting in case of felony hath been sufficiently declared in *cap. 34.* in case of murder, in *cap. 48.* in case of burglary, in *cap. 46.* in case of robbery, and need not again be repeated.

Accessaries again are of two kinds, accessaries before the fact committed, and accessaries after.

An accessory before is he, that being absent at the time of the felony committed doth yet procure, counsel, command, or abet another to commit a felony, and it is an offense greater than the accessory after; and therefore in many cases clergy is taken away from accessaries before, which yet is not taken away from accessaries after, as in petit treason, murder, robbery, and wilful burning, by 4 & 5 *P. & M. cap. 4.*

Those offenses, which in the construction of law are sudden and unpremeditated, cannot have any accessaries before,

fore, as killing a man *per infortunium*, *se defendendo*, or manslaughter.

And therefore, if *A.* be indicted of murder, and *B.* as accessory before, if the jury find *A.* guilty only of manslaughter, there shall be no inquiry of *B.* but he shall be forthwith discharged, because bare homicide is always sudden, for if it were premeditated, it had been murder and not barely homicide, *Bibith's case (c)*, but there may be an accessory after.

Again, the exility of the offense, tho it be felony, yet because it is not capital excludeth accessories before or after, and therefore in petit larciny there can be no accessory, *Anne Lafington's case, P. 42 Eliz. B. R. (d)*; and this is also the reason, why there can be no accessory neither before nor after in manslaughter *per infortunium*, or *se defendendo*, because there is no judgment of death in that case.

That which makes an accessory before is command, counsel, abetment, or procurement by one to another to commit a felony, when the commander or counsellor is absent at the time of the felony committed, for if he be present, he is principal.

And therefore words, that found in bare permission, make not an accessory, as if *A.* say he will kill *J. S.* and *B.* say you may do your pleasure for me, this makes not *B.* accessory. 21 *H. 7.* 36, 37. *Cromp.* 41. *b.*

If *A.* hire *B.* to mingle or lay poison for *C.* *B.* doth it accordingly, and *C.* is poisoned, *B.* tho absent, is principal, *A.* is accessory; but if *A.* were present at the mingling or laying of the poison, tho both were absent at the taking of it, yet both are principal, for they are both equally acting in the poisoning.

But if *A.* buy the materials of the poison, knowing and consenting to the design, and deliver them to *B.* to mingle and apply it, or lay it in the absence of *A.* here it seems *A.* is only accessory before: *quod vide Co. P. C. cap. 7. p. 50. Franklin's case. (e)*

If *A.* command or counsel *B.* to commit felony of one kind, and *B.* commits a felony of another kind, *A.* is not accessory,

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(c) 4 *Co. Rep.* 43. *b.* (d) *Cro. Eliz.* 750. (e) *State Tr.* Vol. I. *p.* 529.

cessary, as if *A.* command *B.* to steal a plate, and *B.* commits burglary to steal the plate, *A.* is accessory to the theft, but not to the burglary. *Co. P. C. cap. 7. p. 51.*

If *A.* command *B.* to take *C.* and *B.* takes *C.* and robs him, *A.* is not accessory to the robbery.

But if *A.* command *B.* to beat *C.* and *B.* beats *C.* so that he dies, *A.* is accessory, because it may be a probable consequence of his beating, 3 *E. 3. Coron. 314. Stamford. P. C. Lib. I. cap. 45. fol. 41. a.* the like it is if he command *B.* to rob him, and in robbing him *B.* kills him, *A.* is accessory to the murder. *Plowd. Com. 475. Crompt. 43. b.*

A. commands *B.* to burn the house of *C.* *B.* kills, robs, or steals from *C.* *A.* is not accessory, for it is an offense of another kind; so if *A.* commands *B.* to steal the horse of *C.* and he steals his cow, *A.* is not accessory. *Plowd. Com. 475. Saunder's case.*

But if *A.* command *B.* to steal generally from *C.* then he is accessory to any kind of theft from *C.* tho it were done by robbery, for that varies the offense only in degree.

A. commands *B.* to poison *C.* *B.* kills him with a sword, yet *A.* is accessory, for the substance of the thing commanded was the death of *C.* and the differing in the manner of its execution from the command doth not excuse *A.* from being accessory.

But if *A.* command *B.* to kill *C.* and *B.* by mistake kills *D.* or else in striking at *C.* kills *D.* but misseth *C.* *A.* is not accessory to the murder of *D.* because it differs in the person. *Co. P. C. cap. 7. p. 51. Plowd. Com. 475. Saunder's case.*

A. gets *B.* with child, and before the birth counsels *B.* to kill it, the child is born, *B.* murders it, *A.* is accessory to the murder, yet at the time of the counsel given the child was not *in rerum naturâ.* 2 *Eliz. Dy. 186. a.*

A. lets out a wild beast, or employs a madman to kill others, whereby any is killed, *A.* is principal in this case, tho absent, because the instrument cannot be a principal. *Dalt. cap. 108. (f)*

A. commands *B.* to kill *C.* but before the execution thereof *A.* repents and countermands *B.* and yet *B.* proceeds in the execution thereof, *A.* is not accessary, for his consent continues not, and he gave timely countermand to *B.* *Co. P. C. cap. 7. p. 51. Plowd. Com. 474. Saunder's case*; but if *A.* had repented, yet if *B.* had not been actually countermanded before the fact committed, *A.* had been accessary.

C H A P. LVI.

Of accessaries after the fact.

THIS kind of accessary after the fact is where a person knowing the felony to be committed by another receives, relieves, comforts, or assists the felon.

This, as hath been said, holds place only in felonies, and in those felonies, where by the law judgment of death regularly ought to ensue, and therefore there is no accessary in petit larciny, homicide *per infortunium*, or homicide *se defendendo*. 15 E. 3. *Coron.* 116.

I shall consider, 1. What shall not be a receiving or relieving to make an accessary after, and 2. What shall be such a receiving or relieving to make an accessary after.

If *A.* knows that *B.* hath committed a felony, but doth not discover it, this doth not make *A.* an accessary after, but it is misprision of felony, for which *A.* may be indicted, and upon his conviction fined and imprisond.

If *A.* sees *B.* commit a felony, but consents not, nor yet takes care to apprehend him, or to levy hue and cry after him, or upon hue and cry levied doth not pursue him; this is a neglect punishable by fine and imprisonment, but it doth not make *A.* an accessary after, 8 E. 2. *Coron.* 395. 3 E. 3. *Coron.* 293. *Stamf. P. C. Lib. I. cap. 45. f. 40. b. 14 H. 7.*

31. *b.* and the contrary opinion of some old books in this case is therefore rejected.

If *B.* commit a felony, and come to the house of *A.* before he be arrested, and *A.* suffer him to escape without arrest knowing him to have committed a felony, this doth not make *A.* accessary, but if he take money of *B.* to suffer him to escape, this makes him accessary, 9 *H.* 4. 1. and so it is if *A.* shut the fore-door of his house, whereby the pursuers are deceived, and the felon hath opportunity to escape, this makes *A.* accessary, for here is not a bare omission, but an act done by *A.* to accommodate his escape. 8 *E.* 2. *Coron.* 427.

A. hath his goods stolen by *B.* if *A.* receives his goods again simply without any contract to favour him in his prosecution, or to forbear prosecution, this is lawful; but if he receive them upon agreement not to prosecute or to prosecute faintly, this is theft-bote punishable by imprisonment and ransom (*a*), but yet it makes not *A.* an accessary, 42 *Affix.* 5. *b.* 3 *E.* 3. *Coron.* 353. *Stamf. P. C. f.* 40. *a.* but if he take money of *B.* to favour him, whereby he escapes, this makes him accessary. *Dalt.* 263. (*b*), *Crompt.* 41. *b.*

A. hath his goods stolen by *B.* who sells them to *C.* upon a just value, tho *C.* know them to be stolen, this makes not *C.* accessary, unless he receive the felon. *Dalt. cap.* 108. *p.* 288. (*c*)

But by some opinions, if he buy them at an under value, it makes him accessary, *per Crompt.* 43. *b.* and *Sir Nich. Hyde Dalt. ubi supra*; but it seems this makes not an accessary, for if there be any odds, he that gives more, benefits the felon more than him that gives less than the value, but it may be a misdemeanor punishable by fine and imprisonment, and the buying at an under value is a presumptive evidence, that he knew they were stole, but makes him not accessary.

If *A.* hath his goods stolen by *B.* and *C.* knowing they were stolen receives them, this simply of itself makes not an accessary, and therefore it hath been often ruled (*d*), that to say *J. S. hath received stolen goods knowing them to be stolen,*

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(*a*) *Vide antea p.* 546. & *notas ibid.*

(*b*) *New Edit. p.* 531.

(*c*) *New Edit. ibid.*

(*d*) *Dareson's case, Telw. 4.*

is not actionable, because it imports not felony, but only a trespass or misdemeanor punishable by fine and imprisonment (*e*), for the indictment of an accessory after is that he received and maintained *the thief*, not *the goods* (*f*).

But yet it seems to me, that if *B.* had come himself to *C.* and deliverd him the goods to keep for him, *C.* knowing that they were stolen, and that *B.* stole them, or if *C.* receive the goods to facilitate the escape of *B.* or if *C.* knowingly receive them upon agreement to furnish *B.* with supplies out of them, and accordingly supplies him, this makes *C.* accessory (*g*), and with this seems to agree the preamble of the statute of 2 & 3 E. 6. cap. 24. *Crompt.* 41. *b.* for it is relieving and comforting.

But the bare receiving of stolen goods knowing them to be stolen makes not an accessory, for he may receive them to keep for the true owner, or till they are recoverd or restored by law; and so it seems are the books to be intended of 27 *Affix.* 69. 25 E. 3. 39. (*b*), 9 H. 4. 1. *a.*

If a felon be in prison, he, that relieves him with necessary meat, drink, or clothes for the sustentation of life, is not accessory.

So if he be bailed out till the next sessions, &c. it is lawful to relieve and maintain him, for he is *quodammodo* in custody,

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(*e*) By 3 & 4 W. & M. cap. 9. "Receivers of stolen goods knowing them to be stolen are to be deemed accessories after the fact, and suffer as such;" but because these receivers often concealed the principal felons, and thereby escaped being punished as accessories; therefore by 1 Ann. cap. 9. "Whosoever shall buy or receive stolen goods knowing them to be stolen may be prosecuted for a misdemeanor, and punished by fine and imprisonment, tho the principal felon be not convicted;" and this shall exempt them from being punished as accessories, if the principal shall afterwards be convicted.

(*f*) But by 5 Ann. cap. 31. "If any person shall receive or buy knowingly any stolen goods, or knowingly harbour or conceal any felon, he shall be taken as accessory to the felon, and shall suffer as a felon;" this statute

does not take away the benefit of clergy, but by 4 Geo. I. cap. 11. such person may be transported for fourteen years.

(*g*) But because this was difficult to prove, the confederates of such thieves frequently disposing of such goods to the owners for a reward, under the notion of helping them again to their stolen goods, it is provided by 4 Geo. I. cap. 11. "That whosoever shall take a reward under the pretense of helping any one to stolen goods, shall suffer as a felon, as if he himself had stolen the said goods, unless he cause such felon to be apprehended and brought to trial, and give evidence against him;" upon this clause the famous *Jonathan Wild* was convicted and executed. 10 Geo. I.

(*b*) In the last edition of the year-books, which is in this place mispaged, it is 25 E. 3. 82. *b.*

dy, and is under a certainty of coming to his trial. *Crompt.* 42. b. *Dalt.* p. 286. (i).

And therefore it is not treason thus to relieve a traitor, while he is in custody or under bail, and therefore the statute of 27 *Eliz. cap.* 2. that makes it felony to relieve a jesuit, hath yet this qualification *being at liberty and out of hold.*

But if a felon be in gaol, for a man to convey instruments to him to break prison to make an escape, or to bribe the gaoler to let him escape makes the party an accessary, for the common humanity allows every man to afford them necessary relief, yet common justice prohibits all men unlawful attempts to cause their escapes.

If *A.* speak or write in favour of a prisoner for his favour and deliverance, this makes him not an accessary. 26 *Affiz.* 47.

To instruct a felon to read thereby to save him by his clergy makes not an accessary. *M.* 7 *R.* 2. (k), *Co. P. C. cap.* 64. p. 139.

If *A.* be committed for felony, and *B.* an attorney advise the friends of *A.* to write to the witnesses not to appear against him, who writes accordingly, this makes neither *B.* nor the friends accessary, but is a misdemeanor punishable by fine and imprisonment. *Co. P. C. ubi supra.*

A feme covert cannot be an accessary for the receipt of her husband, for she ought not to discover him.

But the husband may be an accessary for the receipt of his wife. *Stamf. P. C. Lib. I. cap.* 19. fol. 26. a.

If the wife alone, her husband being ignorant, do knowingly receive *B.* a felon, the wife is accessary and not the husband. 15 *E.* 2. *Coron.* 383.

But if the husband and wife both receive a felon knowingly, it shall be judged only the act of the husband, and the wife acquitted. *M.* 37 *E.* 3. *Rot.* 34. *in dorf. Rex. Coram Rege.* (l)

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To

(i) *New Edit.* p. 530.

(k) *Rot.* 3^o. *Rex. Cant.*

(l) This was the case of *Richard Dey* and *Margery* his wife, (*vide supra* p. 47.) who had been indicted before the sheriff of *Lincoln pro receptamento felonum*; the

indictment was sent *coram rege*: *Richard* surrendered himself and alleged, that he had been tried and acquitted on the said indictment before the justices of gaol-delivery at *Lincoln*, and was admitted to bail; after which the judge of gaol-delivery

To make an accessary to felony there must be a felony committed by him, to whom he is accessary.

A. gives *B.* a mortal stroke, *C.* receives or relieves *A.* or helps him to escape, and then *B.* dies, *C.* shall not be an accessary to the felony, because when he received him no felony was done.

But a man may be accessary to an accessary by the receiving of him knowing him to be an accessary to felony. *Stamf. P. C. cap. 46. f. 43. b. 22 Assiz. 52.*

There can be no accessary in receipt of a felon, unless he know him to have committed a felony: *vide Stamford's P. C. 41. b.*

But yet it hath been held, that if the party be attaint of felony by outlawry or otherwise in the county of *A.* if any one of that county receive him, he is accessary, whether he had notice or not, because he is a felon by matter of record, whereof all in the same county ought to take notice. *12 E. 2. Coron. 377. Stamf. P. C. cap. 46. fol. 41. b.*

But it seems to me necessary to make an accessary after, that there be notice, altho the felon were attaint in the same county, for presumption shall not make men criminal, where the punishment is capital.

delivery sent the record of *Richard's* acquittal; *Margery* the wife pleaded, that she also had been tried and acquitted, and was also bailed, but afterwards she not appearing a *Capias* was awarded against her and her bail: upon this her husband and one *John Hode* two of her bail come into court, *Et petunt ipsos admitti ad finem cum domino rege occasione prædictâ faciendum, & admittuntur*; sometime afterwards the said *John Hode* came into court and alleged, that he had been unjustly fined, "Quia prædictum indictamentum super prædictam *Margeriam* factum minus sufficiens est, eo quod prædicta *Margeria* tempore, quo ipsa dictos felones recepit seu eis consentire debuisset, fuit cooperta prædicto *Ricardo* viro suo, & adhuc est

" & omnino sub potestate sua [ejus], cui ipsa in nullo contradicere potuit, & ex quo non inseritur in indictamento prædicto, quod ipsa aliquod malum fecit, nec eis consentivit, seu ipsos felones recepit ignorante viro suo, petit judicium, si ipsa vivente viro suo de aliquo receptamento in præsentia viri sui occasionari possit." The court took time to consider of this plea, and in *Michaelmas* term anno 4^{to} gave the following judgment, "Viso & diligenter examinato indictamento prædicto super præfatam *Margeriam* facto videtur curiæ, quod indictamentum illud minus sufficiens est ad ipsam inde ponere responsuram. Ideo cesset processus versus eam omnino. See *Co. P. C. p. 108.*

C H A P. LVII.

*Concerning the order of proceeding
against accessaries.*

THE accessary may be indicted in the same indictment with the principal, and that is the best and most usual way; but he may be indicted in another indictment, but then such indictment must contain the certainty and kind of the principal felony.

If a man were accessary before or after in another county, than where the principal felony was committed, at common law it was dispunishable, but now by the statute of 2 & 3 E. 6. cap. 24. the accessary is indictable in that county, where he was accessary, and shall be tried there, as if the felony had been committed in the same county; and the justices, before whom the accessary is, shall write to the justices, &c. before whom the principal is attainted, for the record of the attainder.

This writing is to be by writ in the king's name under the *teste* of the justice so sending it. *Dy.* 253. *b.*

If the accessary be indicted either alone or together with the principal, process of outlawry shall not go against the accessary till the principal be attainted or outlawed, neither shall he be put to plead till the principal appear, but shall be bailed till the principal appear: *vide Westm.* 1. cap. 14. (*a*)

The accessary shall not be constrained to answer to his indictment, till the principal be tried, 9 E. 4. 42. *a.* but if he will wave that benefit, and put himself upon his trial before the principal be tried he may, and his acquittal or conviction upon such trial is good. *Stamf. P. C. Lib. I. cap. 49. f. 46. b.*

But it seems necessary in such case to respite judgment till the principal be convicted and attaint, for if the principal be after acquitted, that conviction of the accessary is annulled,

(a) 2 Co. *Instit.* 183. This is now altered by 1 *Ann. cap. 9.*

nulled, and no judgment ought to be given against him; but if he be acquitted of the accessory, that acquittal is good, and he shall be discharged. 8 H. 5. 6. b. *Coron.* 463.

If *A. B.* and *C.* be indicted as principals, and *D.* is indicted as accessory to them all, *D.* shall not be arraigned till all the principals be attaint or outlawed, for if *A.* and *B.* be tried, and acquit or attaint, yet *D.* may be accessory to *C.* and not to *A.* nor *B.* but if *A. B.* and *C.* be indicted as principals, and *D.* indicted as accessory to *A.* only, there if *A.* be attaint, tho *B.* and *C.* be not, yet *D.* shall be arraigned. 40 *Affiz.* 25. *Coron.* 216. 7 H. 4. 36. b. *Stamf. ubi supra.*

But yet the court may if they please arraign the accessory in the first case (*b*), for if he be found accessory he shall have judgment, but if acquitted of being accessory to *A.* yet that acquittal dischargeth him not of being accessory to *B.* or *C.* and therefore when they come in and plead and are attaint, *D.* may be arraigned *de novo* as accessory to *B.* and *C.* *Plowd. Com.* 98. b. *Gittin's case.* So that it is in the discretion of the court to arraign him or not before *B.* and *C.* be attaint, tho it be the safer course to respite the arraignment of the accessory till *B.* and *C.* appear or are outlawed.

If *A.* be indicted or appeal'd as principal, and *B.* as accessory before or after by the same indictment, and the principal plead in bar or abatement, or *autresfoits acquit*, the accessory shall not be forced to answer, till that plea be determined, for if it be found for *A.* the accessory is discharged, if against *A.* yet he shall after plead over to the felony, and may be acquitted. 9 H. 7. 19. b.

If *A.* be indicted as principal, and *B.* as accessory, they may be both arraigned together, and plead together, and put upon their trial by the same jury, and the jury shall be charged to inquire first of the principal, and if they find him not guilty, then to acquit the accessory; but if they find him guilty, then to inquire of the accessory. *Seigneur Sanchar's case (c)*,

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40 *Affiz.*

(*b*) To make this consistent with what goes before, we must understand the former passage to mean, that where he is indicted as accessory to all, he shall not be arraigned *as accessory to them all* till all be attaint or outlawed, and *this*,

that the court may in such case, if they please, arraign him only *as accessory to him who is attaint*, tho the others do not appear.

(*c*) 9 *Co. Rep.* 119. a.

40 *Affiz.* 2. 7 *H.* 4. 36. *b.* *Coke super statute Westm.* 1. *cap.* 14. (*d*); but in that case judgment must be first given of the principal, for if any thing obstruct judgment, as clergy, a pardon, &c. the accessory is to be discharged.

If *A.* be attaint of murder upon an appeal, and then *A.* is indicted of murder as principal, and *B.* as accessory, the principal pleads the former attainder, *B.* shall not be put to answer as accessory, because he is not attaint upon the same suit, and so it is if the attainder of *A.* were first upon the appeal. 7 *H.* 4. 36. *a.* *Stamf. P. C.* 47. *a.* *Coke ubi supra.*

If the principal be attainted and hath his clergy, or be pardoned after attainder, the accessory shall be put to answer; but if the principal be only convicted and hath his clergy, or be pardoned, or stand mute, or die in prison before judgment, or challenge above thirty-six peremptorily, the accessory shall not be put to answer, for the principal was never attainted (*e*), and altho formerly there were diversity of opinions in the books in these cases (*f*), yet the law is now settled as above (*g*), 4 *Co. Rep.* 43, 44. *Bibith's case* and *Syer's case*, *Coke super Westm.* 1. *cap.* 14.

If the principal be erroneously attaint, the accessory shall be put to answer, and shall not take advantage of the error in that attainder, 2 *R.* 3. 21, 22. but the principal reversing the attainder reverseth the attainder of the accessory. 18 *E.* 4. 9. *b.*

If *A.* be indicted as principal, and *B.* as accessory before or after, and both be acquit, yet *B.* may be indicted as principal, and the former acquittal as accessory is no bar. 4 *E.* 6. *B. Coron.* 186. *Knightley's case*, *Crompt. f.* 43. *a.*

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But

(*d*) 2 *Co. Instit.* 184.

(*e*) It was for this reason, that *Weston* the principal actor in the murder of *Sir Thomas Overbury* could not for a long while be prevailed with to plead, that so the earl and countess of *Somerset*, who were the movers and procurers might escape. See *State Tr.* Vol. I. p. 314.

(*f*) See *Coron.* 51, 58.

(*g*) But since our author wrote, it is settled quite otherwise by 1 *Ann. cap.* 9. for by that statute, " If any principal

" offender shall be convicted of felony,
 " stand mute, or challenge above twenty,
 " it shall be lawful to proceed against
 " the accessory, either before or after
 " the fact, in the same manner as if
 " such principal felon had been at-
 " tainted thereof, notwithstanding such
 " principal felon be admitted to his
 " clergy, or otherwise delivered before
 " attainder; and every such accessory,
 " if convicted, stand mute, &c. shall
 " suffer the same punishment, as if such
 " principal had been attainted.

But if *A.* be indicted as principal and acquitted, he shall not be indicted as accessory before, and if he be, he may plead his former acquittal in bar, for it is in substance the same offense, *Stamf. P. C. Lib. II. cap. 36. fol. 105. a. 2 E. 3. Coron. 150 & 282.* but the antient law was otherwise. *8 E. 2. Coron. 424.*

But if he be indicted as principal and acquitted, he may yet be indicted as accessory after, for they are offenses of several natures. *27 Assiz. 10. 8 H. 5. Coron. 463. Stamf. P. C. ubi supra.*

And so it is, if he be indicted as accessory before and acquitted, yet for the same reason he may be indicted as accessory after.

C H A P. LVIII.

Concerning felonies by act of parliament, and first concerning rape.

HAVING thus considered the felonies, that are by the common law, I now proceed to the handling of felonies by act of parliament, and because it is hardly possible to reduce the titles of them under any dependent method, and difficult to digest them under heads, I shall take them up in order of time according to the series and order of the reigns and years of the several kings, wherein they were enacted, only where I meet with any felony in the time of any king's reign I shall as near as I can bring together those Acts of Parliament both before and after, that concern that subject.

And first concerning rape.

Rape was antiently a felony, as appears by the laws of *Adelstane* mentiond by *Braçton Lib. III. (a)*, and was punished by los of life.

But in proceſs of time that puniſhment ſeemed too hard, but the truth is a ſevere puniſhment ſucceeded in the place thereof, *viz.* caſtration and the loſs of eyes (*b*), as appears by *Braçton* (who wrote in the time of *Henry III.*) *Lib. III. cap. 28.* but then, tho the offender were convict at the king's ſuit, the woman that was raviſhed (if ſingle) might, if ſhe pleaſed, redeem him from the execution, if ſhe elected him for her huſband, and the offender conſented thereunto, as appears by *Braçton ubi ſupra.*

This kind of puniſhment it ſeems continued till 3 *E. 1.* and then by the ſtatute of *Westm. 1. cap. 13. (c)*, it was enacted, " That none raviſh or take with force a damſel within
" age with her conſent nor againſt her conſent, nor no
" dame, damſel of age, nor any other woman againſt her
" will ; and if any do it, the party may ſue within forty
" days, and common right ſhall be done ; and if none ſue
" within forty days, the king ſhall have the ſuit, and the
" party convict ſhall ſuffer two years imprifonment, and be
" ranſomed at the king's pleaſure.

This ſtatute gives a puniſhment by imprifonment and ranſom only, if attaint at the king's ſuit, and takes away caſtration and putting out of eyes ; but it ſeems as to the ſuit of the party, if commenced within forty days, it alters not the puniſhment before, *Le roy lui ferra common droiture.*

But by the ſtatute of *Westm. 2. cap. 34. (d)* the offense of rape is made felony, " If a man raviſh a married woman,
" dame, or damſel, where ſhe neither aſſented before nor
" after, *Eyt judgment de vy & member* ; if ſhe aſſent after,
" yet the king ſhall have the ſuit.

This created rape a felony, and therefore it was not inquirable in a leet, for it was made felony *de novo* by this ſtatute
22 *E. 4. 22. a.* 6 *H. 7. 4. b.*

Rape

(a) *De corona, cap. 28. f. 147. a.*

Sax. p. 222 & 290.

(b) By the laws of *William I.* this offense was punished with caſtration. *Vide Leges Gul. I. l. 19. Wilk. Leg. Anglo-*

(c) 2 *Co. Inſtit.* 180.

(d) 2 *Co. Inſtit.* 433.

Rape is the carnal knowledge of any woman above the age of ten years against her will, and of a woman-child under the age of ten years with or against her will. *Co. P. C. cap. 11. p. 60.*

The essential words in an indictment of rape are *rapuit & carnaliter cognovit*, but *carnaliter cognovit*, nor any other circumlocution without the word *rapuit* are not sufficient in a legal sense to express rape. *1 H. 6. 1. a. 9 E. 4. 26. a.*

To make a rape there must be an actual penetration or *res in re*, (as also in buggery) and therefore *emissio seminis* is indeed an evidence of penetration, but singly of itself it makes neither rape nor buggery, but it is only an attempt of rape or buggery, and is severely punished by fine and imprisonment. *Co. P. C. cap. 10. p. 59.*

But the least penetration maketh it rape or buggery, yea altho there be not *emissio seminis*, *Co. P. C. ubi supra*; the old expression was *abstulit ei virginitatem*, and sometimes *pucellagium suum*. *Bract. Lib. III. (e)*

And therefore I suppose the case in my lord Coke's *12 Rep. 36. 5 Fac.* that saith, there must be both, *viz. penetratio & emissio seminis* to make a rape or buggery, is mistaken, and contradicts what he saith in his pleas of the crown; and besides, it is possible a rape may be committed by some, *quibus virgæ erectio adfit, & emissio seminis ex quodam defectu desit*, as physicians tell us.

If *A.* actually ravish a woman, and *B.* and *C.* were present, aiding and abetting, they are all equally principal, and all subject to the same punishment both at common law and since the statute of *Westm. 2. de quo infra.*

It appears by *Bracton ubi supra*, that in an appeal of rape it was a good exception, *quod ante diem & annum contentas in appello habuit eam ut concubinam & amicam, & inde ponit se super patriam*, and the reason was, because that unlawful cohabitation carried a presumption in law, that it was not against her will.

But this is no exception at this day, it may be an evidence of an assent, but it is not necessary that it should

be so, for the woman may forsake that unlawful course of life.

But the husband cannot be guilty of a rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.

A. the husband of *B.* intends to prostitute her to a rape by *C.* against her will, and *C.* accordingly doth ravish her, *A.* being present, and assisting to this rape: in this case these points were resolved, 1. That this was a rape in *C.* notwithstanding the husband assisted in it, for tho in marriage she hath given up her body to her husband, she is not to be by him prostituted to another. 2. That the husband being present, aiding and assisting, is also guilty as a principal in rape, and therefore, altho the wife cannot have an appeal of rape against her husband, yet he is indictable for it at the king's suit as a principal. 3. That in this case the wife may be a witness against her husband, and accordingly she was admitted, and *A.* and *C.* were both executed. 8 *Car.* 1. *Casus comitis Castelhaven.* (*f*)

If *A.* by force take *B.* and by force and menace compel her to marry him, and then with force *A.* hath the carnal knowledge of *B.* against her will, tho this marriage be voidable, yet it is not so simply void as to enable her to maintain an appeal of rape against *A.* for she may by her consent affirm this voidable marriage, and therefore in the like case *Rot. Parl.* 15 *H.* 6. *n.* 15. there was a special act of parliament to enable the lady *Isabel Butler* to bring an appeal of rape against *William Pull* in that case notwithstanding that marriage; but that marriage had been dissolvable by a declaratory sentence in court christian, because obtained by a plain force; and if such a dissolution of the marriage had been obtained, then it seems to me, that, if the carnal knowledge of her were forcible and against her will as well as the marriage, that rape was punishable as well by appeal at the suit of the lady, as by indictment at the suit of the king, without the aid of an act of parliament, for it was really a rape, only the marriage *de facto*

was an impediment of its punishment so long as *de facto* the marriage continued, but now that impediment being removed by the declaratory sentence, and the marriage made void *ab initio*, it is all one as if it had never been, and tho relation be a legal fiction and *intenta ad unum*, yet in this case the marriage and carnal knowledge being one intire act of force and consecutive one upon another, in the real effect of that first force, it shall remain punishable as if there had been no marriage at all; but the statute of 3 H. 7. cap. 2. (g) hath provided a remedy in this case, so that this difficulty need not come in question.

An infant under the age of fourteen years is presumed by law unable to commit a rape, and therefore it seems cannot be guilty of it, and tho in other felonies *malitia supplet ætatem* in some cases as hath been shewn, yet it seems as to this fact the law presumes him impotent, as well as wanting discretion.

But he may be a principal in the second degree, as aiding and assisting, tho under fourteen years, if it appear by sufficient circumstances, that he had a mischievous discretion, as well as in other felonies.

Thus far of the nature of rape, and who may be culpable of it. Now we will consider upon whom it may be committed, and some other considerations touching this fact.

It was doubted, whether a rape could be committed upon a female child under ten years old, *Mich. 13 & 14 Eliz. Dy. 304. a.* By the statute of 18 Eliz. cap. 7. it is declared and enacted, "That if any person shall unlawfully and carnally know and abuse any woman-child under the age of ten years, it shall be felony without the benefit of clergy."

My lord *Coke* adds the words, *either with her will or against her will*, as if were she above the age of ten years, and with her will, it should not be rape; but the statute gives no such intimation, only declares that such carnal knowledge is rape.

(g) By this statute a forceable taking away and marrying a woman against her will is made felony.

And therefore it seems, if she be above the age of ten years and under the age of twelve years, tho she consent, it is rape, 1. Because the age of consent of a female is not ten but twelve. 2. By the statute of *Westm. 1. cap. 13. Roy defend, que nul ne ravise ne prigne a force damsel deins age, ne per son gree ne sans son gree*; and my lord Coke in his exposition upon that statute (b) declares, that these words *deins age* must be taken for her age of consent, viz. twelve years, for that is her age of consent to marriage, and consequently her consent is not material in rape, if she be under twelve years old, tho above ten years old, altho those words are by some mistake crept into my lord Coke's definition of rape, *Co. P. C. cap. 11.* but if she be above the age of twelve years, and consenting at the time of the fact committed, it is not felony.

But if she were above the age of twelve years, and consented upon menace of death, if she consented not, this is not a consent to excuse a rape. 5 E. 4. 6. a. *Dalt. cap. 107. (i)*

And therefore that opinion of Mr. Finch cited by Dalton *ubi supra*, and by Stamford, *cap. 14. fol. 24.* out of Britton, that it can be no rape, if the woman conceive with child, seems to be no law, *mulier enim vi oppressa concipere potest.*

If the woman consented not at the time of the rape committed, but consented after, she shall not have an appeal of rape by the statute of *Westm. 2. cap. 34.* but yet the king shall have the suit by indictment, and by the statute of 6 R. 2. *cap. 6.* if she have a husband, he shall have an appeal, and if she have none, then her father or other next of blood shall have an appeal of such rape; and by the same statute as well the ravisher as the ravished, that so assented, are disabled to have any dower, inheritance or jointure; and the next of blood of such ravisher or assenting ravished, to whom their lands should revert, remain, or fall after their death, shall enter upon the same, and hold it as an estate of inheritance.

But an assent after through menace of death is not such an assent, as incurs this penalty; *quod vide 5 E. 4. 6. a.*

As

(b) 2 Inst. 182.

(i) New Edit. cap. 160. p. 524.

As in other felonies, so in this there are or may be accessaries before and after, for tho this be a felony by act of parliament, that speaks only of those that commit the offense, yet consequentially and incidentally accessaries before and after are included, and so in every new statute making a felony without speaking of accessaries before or after. *Co. P. C. cap. 10. p. 59.* and so in buggery.

And note, that at the time of the making of the statute of 13 E. 1. rape was not felony, for it had long continued under the nature only of a misdemeanor and not a felony, and therefore it is not at this day inquirable in a leet, because it is a felony newly created. *6 H. 7. 4. b. 22 E. 4. 22. a.*

The regular means of bringing this offense to judgment was either at the suit of the king by indictment, or at the suit of the party by appeal.

The indictment ought to have these ingredients, 1. It must be *felonice*. 2. It must be *rapuit & carnaliter cognovit*. 3. It must conclude *contra formam statuti* 13 & 14 Eliz. Dy. 304. a.

It may be prosecuted by indictment at any time, *for nulum tempus occurrit regi*.

An appeal of rape lies for the party ravished, and if she consent after the rape, she is barred of her appeal, and her husband, if married, or the next of kin, if single, may have the appeal by the statute of 6 R. 2. cap. 6.

If the next of kin were the ravisher, his next of kin shall have the appeal by the equity of the statute of 6 R. 2. 28 H. 6. *Coron. 459.*

As to the appeal of the party ravished two things are necessary, 1. That she make fresh discovery and pursuit of the offense and offender, otherwise it carries a presumption that her suit is but malicious and feigned; this *Bracton* at large describes *Lib. III. cap. 28. f. 147. a. Cum igitur virgo corrupta fuerit & oppressa, statim cum factum recens fuerit cum clamore & hutesio debet accurrere ad villas vicinas, & ibi injuriam sibi illatam probis hominibus ostendere, sanguinem & vestes suas sanguine tinctas & vestium scissuras, & sic ire debet ad prepositum hundredi & ad servientem domini regis, & ad coronatores & vice-*
comitem,

comitem, & ad primum comitatum faciat appellum, &c. 2. That the appeal be speedily prosecuted, for it seems, that a year and a day is not allowd in this appeal, but some short time, tho it be not defined in law what time, but lies much in the discretion of the court upon the circumstances of the fact, yet the statute of *Westm. 1. cap. 13.* allowd but forty days: long delay of prosecution in such case of rape always carries a presumption of a malicious prosecution. 3. If the wife hath once consented after, her appeal is barred.

By the statute of *18 Eliz. cap. 7.* the principals in rape are ousted of clergy, whether they be principals in the first degree, *viz.* he that committed the fact, or principals in the second degree, *viz.* present, aiding, and assisting; but accessaries before and after have their clergy.

Touching the evidence in an indictment of rape given to the grand jury or petit jury.

The party ravished may give evidence upon oath, and is in law a competent witness, but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury, and is more or less credible according to the circumstances of fact, that concur in that testimony.

For instance, if the witness be of good fame, if she presently discovered the offense and made pursuit after the offender, shewd circumstances and signs of the injury, whereof many are of that nature, that only women are the most proper examiners and inspectors, if the place, wherein the fact was done, was remote from people, inhabitants or passengers, if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony, when proved by others as well as herself.

But on the other side, if she conceald the injury for any considerable time after she had opportunity to complain, if the place, where the fact was supposed to be committed, were near to inhabitants or common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, when and where it is probable she might be heard by others; these and the like circumstances carry a strong presumption, that her testimony is false or feigned.

If the rape be committed upon a child under twelve years old, whether or how she may be admitted to give evidence may be considerable. (*)

It seems to me, that if it appear to the court, that she hath that sense and understanding that she knows and considers the obligation of an oath, tho she be under twelve years, she may be sworn; thus we find it done in case of evidences against witches, an infant of nine years old was sworn. *Dalt. cap. 111. p. 297. (k)*

But if it be an infant of such tender years, that in point of discretion the court sees it unfit to swear her, yet I think she ought to be heard without oath to give the court information, tho singly of itself it ought not to move the jury to convict the offender, nor is it in itself a sufficient testimony, because not upon oath, without concurrence of other proofs, that may render the thing probable; and my reasons are, 1. The nature of the offense, which is most times secret, and no other testimony can be had of the very doing of the fact, but the party upon whom it is committed, tho there may be other concurrent proofs of the fact when it is done. 2. Because if the child complain presently of the wrong done to her to the mother or other relations, their evidence upon oath shall be taken, yet it is but a narrative of

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(*) For she might at that age maintain an appeal *pro raptu*, *Pasch. 33 E. 1. Rot. 16. in dorso. London. Coram Rege. James Poebin merchant* was attached, and brought *Coram Rege* to answer to *Isabel* daughter of *Emma de Langeleye de raptu*, & *pate regis fractâ*, who appealed him after this manner, *per quemdam narratorem suum dicens*,---*Isabella filia Emma de Langeleye de etate novem annorum & dimidii dicit, quod prædictus Jacobus die dominicâ proximâ post festum sancti Martini, anno R. R. E. 33. apud London in altâ stratâ regis ex opposito ecclesie sancti Benedicti de Scherhog horâ vespertinâ ipsam Isabellam cepit, & in quâdam tabernâ suâ portavit, & contra pacem domini regis cum eâ concubuit, & virginitatem suam rapuit; & petit quod justitiam domini regis super hoc sibi faciant justitiam & remedium.* Et queritur, quod prædicta transgressio sibi facta fuit die &

anno prædictis ad dampnum ipsius Isabellæ centum librarum, &c. Et prædictus Jacobus venit, & descendit omnem feloniam, raptum, &c. Et petit allocantiam de appello ipsius Isabellæ, desicut ipsum Jacobum per verba in appello usualia, & necessaria, ac convenientia, non appellat. Et quia constat curiæ, quod appellum, &c. insufficient est, consideratum est, quod prædicta Isabella committatur marescallo; & postea ei remittitur prisona, & prædictus Jacobus quoad appellum ipsius Isabellæ eat imperpetuum quietus, &c. He was then arraigned at the king's suit de raptu prædicto, and was tried, and convicted, but the king afterwards remisit prædicto Jacobo judicium vite & membrorum; & quod faciat redemptionem pro delicto prædicto, & finem fecit cum domino rege per centum libras.

(k) *New Edit. p. 541.*

of what the child told them without oath, and there is much more reason for the court to hear the relation of the child herself, than to receive it at second-hand from those, that swear they heard her say so; for such a relation may be falsified, or otherwise represented at the second-hand, than when it was first deliverd.

But in both these cases, whether the infant be sworn or not, it is necessary to render their evidence credible, that there should be concurrent evidence to make out the fact, and not to ground a conviction singly upon such an accusation with or without oath of an infant.

For in many cases there may be reason to admit such witnesses to be heard in cases especially of this nature, which yet the jury is not bound to believe; for the excellency of the trial by jury is in that they are the triers of the credit of the witnesses as well as the truth of the fact; it is one thing, whether a witness be admissible to be heard, another thing, whether they are to be believed when heard.

It is true rape is a most detestable crime, and therefore ought severely and impartially to be punished with death; but it must be remembred, that it is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, tho never so innocent.

I shall never forget a trial before myself of a rape in the county of *Suffex*.

There had been one of that county convicted and executed for a rape in that county before some other judges about three assizes before, and I suppose very justly: some malicious people seeing how easy it was to make out such an accusation, and how difficult it was for the party accused to clear himself, furnished the two assizes following with many indictments of rapes, wherein the parties accused with some difficulty escaped.

At the second assizes following there was an antient wealthy man of about sixty-three years old indicted for a rape, which was fully sworn against him by a young girl of fourteen years old, and a concurrent testimony of her mother and father and some other relations. The antient man, when

when he came to his defense, alleged that it was true the fact was sworn, and it was not possible for him to produce witnesses to the negative; but yet, he said, his very age carried a great presumption, that he could not be guilty of that crime; but yet he had one circumstance more, that he believed would satisfy the court and the jury, that he neither was nor could be guilty, and being demanded what that was, he said, he had for above seven years last past been afflicted with a rupture so hideous and great, that it was impossible he could carnally know any woman, neither had he upon that account during all that time carnally known his own wife, and offered to shew the same openly in court; which for the indecency of it I declined, but appointed the jury to withdraw into some room to inspect this unusual evidence; and they accordingly did so, and came back and gave an account of it to the court, that it was impossible he should have to do with any woman in that kind, much less to commit a rape, for all his bowels seemd to be fallen down into those parts, that they could scarce discern his privities, the rupture being full as big as the crown of a hat, whereupon he was acquitted.

Again, at *Northampton* assizes before one of my brother justices upon the *Nisi prius*, a man was indicted for the rape of two young girls not above fourteen years old, the younger somewhat less, and the rapes fully proved, tho peremptorily denied by the prisoner, he was therefore to the satisfaction of the judge and jury convicted; but before judgment it was most apparently discovered, that it was but a malicious contrivance, and the party innocent; he was therefore reprieved before judgment.

I only mention these instances, that we may be the more cautious upon trials of offenses of this nature, wherein the court and jury may with so much ease be imposed upon without great care and vigilance; the heinousness of the offense many times transporting the judge and jury with so much indignation, that they are over-hastily carried to the conviction of the person accused thereof by the confident testimony, sometimes of malicious and false witnesses.

C H A P. LIX.

Concerning the felony de uxore abductâ
sive raptâ cum bonis viri super statu-
tum Westm. 2. cap. 34.

THE words of the statute are, *De mulieribus abductis cum bonis virorum suorum habeat rex sectam de bonis sic asportatis.*

This part of the statute hath affinity with what goes before in the same statute concerning rape; and tho this learning hath been long antiquated, yet it is of use to be known.

If a wife goes away of her own consent with another man, and takes with her the goods of the husband, this seems to be felony neither in the man nor in the wife, tho *Dalt. cap. 104. p. 266. (a)* takes it to be a felony in the man, that takes her and the goods; but it is a trespass, for which at common law the husband may have an action of trespass, *quare uxorem suam cepit & abduxit cum bonis viri.*

But if *A.* take the wife of *B.* against her will with the goods of her husband, but doth not actually ravish the wife, it is felony as to the goods, for which the party may be indicted; but as to the taking away of the wife it is but a trespass, for which the husband may have his action of trespass at common law, *quare uxorem suam rapuit & eam cum bonis & catallis ad valent' &c. abduxit & adhuc detinet*, and in that action shall recover damages for the taking of his wife and goods at common law.

But it should seem, that he might have his action grounded upon the statute of *Westm. 2.* which differs only in this from a trespass at common law, 1. That the trespass at common law is *pone per vadios, &c.* but this is *attachies*, 14 *H. 6. 2. b.* Again, 2. The writ at common law is general, but this upon

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the statute concludes *contra formam statuti, quod vide Fitz. N. B. 89. 9 H. 6. 2. a.*

But without question, if the wife were actually ravished and the goods taken, this action lies for the husband, and he shall recover damages for the rape as well as the goods, tho the wife were dead or divorced after the rape. 44 *Affiz.* 13. 47 *E. 3. Action sur statute 37.*

And it seems such an action was antiently in the nature of an appeal of rape and robbery grounded upon the statute of *Westm. 2.*

And by the antient law the defendant being convicted in a writ founded upon this statute, as before, was to have judgment of death, which appears most evidently by the ordinance of parliament, *Rot. Parl. 8 E. 2. M. 3.* and afterwards sent by *Mittimus* into the king's bench, *T. 11 E. 2. Rot. 4. London,* which recites, that in such case the defendant was notailable, *Et quod idem implacitatus, si hujusmodi transgressione convictus fuisset, suspensioni adjudicari deberet,* and therefore provides, that the defendant, if of good fame, shall be bailed.

And according to this are the books 13 *Affiz.* 5. 15 *E. 3. Utlagarie 49. Coron. 122. 18 E. 3. 32. a.* and a case of a vicar cited to be 13 *E. 2.* who had his clergy in this case, but it should seem it was intended, 1. When a rape was actually committed, *vide 44 Affiz. 13.* and 2. When the action was grounded upon the statute, and not barely at common law.

But the law hath been long refused to give a capital judgment upon this writ, and in process of time nothing, as it seems, was recoverd but damages, tho the writ were brought upon the statute, for *rapuit* is now intended of a simple taking. 9 *Eliz. Dy. 256. b. 2 Co. Instit. 435. super Westm. 2. cap. 34. 43 E. 3. 23. a.*

And it seems the law was accordingly taken, for the statute of 6 *R. 2. cap. 6.* gives an appeal to the husband for the rape of his wife in some cases, which it needed not have done, if by the law, as it was then used, the husband might upon such a writ convict the party, and obtain judgment of death against him.

And besides, it was very inconvenient, that in a civil action formed for damages, and that wants the material terms of law to expresse a felony, (namely *carnaliter cognovit* and *felonice*) judgment of death should be given, and so this course expired of itself.

C H A P. LX.

Of felony by purveyors taking victuals without warrant.

BY the statute of *Articuli super Cartas, cap. 2.* It is enacted, *Si nul face prises sans garrant, & les emport encountre volunt de celui, a qe les biens sont, soit maintenant arrest per le vill, ou le prise serra fait, & amesne al prochein gaol: Et si de ceo soit attaint, soit fait de lui, come de laron, si la quantite de biens le demand.*

If *A.* having no commission take goods by pretense of a commission as purveyor, and the party not knowing that he hath no commission sell and suffer him to take it, yet this is felony; but if the owner knew he had no commission, and yet willingly sell it to him as a purveyor, and he take and carry it away, this is not a carrying away against the consent of the owner to make a felony within this statute. *2 Co. Instit. p. 546. super Articulis, cap. 2.*

This point of felony is confirmed by the statute of *18 E. 3. cap. 7.* and *4 E. 3. cap. 4.*

Afterwards by the statute of *5 E. 3. cap. 2,* and *25 E. 3. cap. 1.* “ If a purveyor shall take goods above the value of
“ twelve-pence without testimony and appraisement of the
“ constable, or without tallies given, this is also felony.

Again

Again, by the statute of 25 E. 3. *cap.* 15. “ If a purveyor take sheep and their wool betwixt *Easter* and *Midsummer*, it is felony, if he shore them at his own house.

Again, by the statute of 36 E. 3. *cap.* 2. “ If any purveyor take goods or carriage, otherwise than is containd in their commission, it is felony.

But in all these felonies the offender is not ousted of clergy, but he shall have it: *vide Co. P. C. cap.* 24.

But these acts of parliament and the punishment of purveyors is now out of date, because by the statute of 12 Car. 2. *cap.* 24. all purveyance is taken away.

Only by two subsequent acts, namely 13 Car. 2. *cap.* 8. and 14 Car. 2. *cap.* 20. there is a special purveyance of carriage settled for the king’s household, and for the navy and carriage of ordnance; but the statute of *Articuli super cartas*, and the other statutes making felony in case of undue purveyance do not concern this new established purveyance, because settled in another way; and therefore I shall say no more touching this matter.

C H A P. LXI.

Concerning the new felonies enacted in the times of E. 2. E. 3. and R. 2.

IN the times of those kings there were but few new felonies enacted other than those touching purveyors, whereof in the former chapter.

By the statute of 1 E. 2. *De frangentibus prisonam* the law was settled in that point, whereof I have said sufficient *supra cap.* 54.

By the statute of 14 E. 3. *cap.* 10. “ If a gaoler or under-keeper by too great durefs of imprisonment, and by pain

“ make any prisoner in his ward to become an appellor
“ against his will, and thereof be attaint, he shall have
“ judgment of life and member.

These words in any act of parliament *Eit judgment de vy*
& *member* create a felony.

This act extends to a gaoler *de facto*, tho he be not a gaoler
de jure.

The offender hath the benefit of clergy: *vide Co. P. C. cap.*
29. p. 91. touching this felony.

By an act *Rot. Par. 17 E. 3. n. 15.* but not printed, the im-
portation of false and evil money is prohibited under pain of
life and member, and the exportation of coin or bullion pro-
hibited under pain of forfeiture, and if the searcher be of
confederacy with the exporter, it is enacted to be felony in
the searcher.

If it be said this act was needless to make importation of
false money felony, because declared treason by the statute of
25 E. 3. the answer is obvious. By the act of *17 E. 3.* before-
mentioend licence was granted to *Dutch* merchants and
others to import their own coin so it were as good as ster-
ling, and that, if they pleased, the merchants might trade
between themselves with that forein money; and it was ne-
cessary in respect of that forein money to impose a new pe-
nalty upon the importers of false money of that kind, because
that forein coin was not within the statute of *25 E. 3.*

But this seems to be but a temporary law during that spe-
cial intercourse between the *English* and *Dutch*, and besides
by subsequent statutes the penalty of treason is annexed to
the importation of counterfeit coin made current by procla-
mation: *quod vide supra cap. 20. p. 225.*

By the statute of *27 E. 3. cap. 3.* of the staple, the expor-
tation of wools, woolfells, leather or lead by any *English*, *I-*
rish or *Welshman*, is prohibited under pain of loss of life and
member, and forfeiture of lands and goods (*a*), but this was
repeald by the statute of *36 E. 3. cap. 11.* whereby it was en-
acted, that merchants denizens may pass with their wool as
well as foreiners without being restrained.

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But

(a) *Co. P. C. p. 95.*

But yet this was not full enough, and therefore by the statute of 38 E. 3. *cap.* 6. there was a fuller repeal of the statute of 27 E. 3. as to the point of felony, yet the forfeiture of lands and goods continued upon merchants denizens, and the statute of the staple was confirmed in all points by 38 E. 3. *cap.* 7.

But by the statute of 43 E. 3. *cap.* 1. the staple of *Calais* was abolished, yet by 14 R. 2. *cap.* 5. exportation of wool, woolfells, leather and lead are prohibited to denizens under pain of forfeiture of them.

By the statute of 27 E. 3. *de provisoribus*, *cap.* 5. ingrossing of *Gascoign* wines made felony, but that penalty repealed by the statute 37 E. 3. *cap.* 16.

So that these statutes stand now repealed.

But yet by the statute of 18 H. 6. *cap.* 15. the carrying of wool or woolfells out of the realm to other places than to the staple of *Calais* without the king's licence is felony, except wools carried to the freights of *Morocco*.

This statute is supposed by my lord *Coke*, *P. C. cap.* 32. to be in force, but that being doubted, because the staple of *Calais* then in use hath been long since abolished, a new provision and a better is made by acts of this present parliament. (*b*)

But whether that act be in force or not, the offender was not thereby excluded of the benefit of clergy.

By the statute of 34 E. 3. *cap.* 22. the concealing and taking away of an hawk was two years imprisonment; but by the statute of 37 E. 3. *cap.* 19. the stealing of a falcon, tercelet, lanner, or laneret is made felony.

See the commentary *Co. P. C. cap.* 34. where it is declared, that this act extends only to falcons, and those of that kind.

The proof intended by this act is not by jury but by circumstances, as varvels, &c.

The offender is within benefit of clergy.

As to the laws in the time of *Richard II.*

6 R. 2. *cap.* 6. concerning the punishment of rape, *de quo factis cap.* 58.

7 R. 2. *cap.* 8. of purveyors, *de quo supra cap.* 60.

By the statute of 13 R. 2. *cap.* 3. “ If any man bring or
“ send into this realm or the king’s power any summons,
“ sentence or excommunication against any person for the
“ cause of making motion, assent or execution of the statute
“ of provisors, he shall be taken, arrested, and put in prison,
“ and forfeit all his lands, tenements, goods and chattels for
“ ever, and incur the pain of life and member; and if any
“ prelate make execution of such summons, sentence or ex-
“ communication, his temporalities shall be taken and abide
“ in the king’s hands till due redress made.

“ And if any person of less estate than a prelate make
“ such execution, he shall be taken and arrested and impris-
“ oned, and make fine and ransom by the discretion of the
“ king’s council.

The bringing in of bulls of this nature is against the com-
mon law, and sometimes antiently punished as high treason.
Vide Co. P. C. cap. 36. & *libros ibi.*

But now by the statute of 13 *Eliz. cap.* 2. the offense as
well in the bringers in, as executors of these bulls, &c. is made
high treason, as well in persons ecclesiastical as temporal.

There is nothing else in these kings reigns, that enacts a
new felony, only some statutes directing the process and ju-
risdiction, whereby felonies may be tried, as 13 R. 2. *cap.* 2.
of the constable and marshal, &c.

C H A P. LXII.

Concerning the new felonies enacted in the times of H. 4. H. 5. H. 6. E. 4.

BY the statute of 5 *H. 4. cap. 4.* it is ordaind, “ That none
“ from thenceforth shall use to multiply gold or silver,
“ nor use the craft of multiplication, and if any do, he shall
“ incur the pain of felony in this case. (a)

And the reason of this act was not because they thought the real transmutation of metals into gold or silver was feasible, but the reason is given in the petition of the commons. *Rot. Par. 5 H. 4. n. 63.*

Car plusers homes par colour de cest multiplication font faux mony a grand deceit du roy & damage de son people: vide tamen Co. P. C. cap. 20. dispensations granted to particular persons by 34 & 35 *H. 6.* for the using of this art with a *non obstante* of the statute of 5 *H. 4.*

The offender is to have his clergy.

And altho the statute mentions not accessaries before or after, yet this statute making the fact felony doth consequentially subject accessaries before and after to the penalty, tho this be made a *quere. Dy. 88.* in *Eden's case*; yet it seems now settled according to the opinion of my lord *Coke*; *P. C. cap. 20.* that there may be accessaries to this new felony before and after.

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(a) The offense prohibited by this act was not the extracting gold or silver out of lead or other metals, which is now known by the name of refining, for that is not the multiplication of gold or silver, but only a separation thereof from the coarser metal, but the design of the act was to prohibit the transmutation of one metal into another, which was pretended to be done by the philosopher's stone or elixir, whereby great numbers

were bubbled and cheated; but however, because some persons were (groundlessly) afraid to exercise the art of smelting and refining metals, lest they should fall under the penalty of this statute, it was therefore repealed by 1 *H. & M. cap. 30.* provided that the gold or silver extracted by the said art be carried to the *Tower of London* for the making of monies, and be not otherwise disposed of.

By the statute of 5 *H. 4. cap. 5.* cutting the tongues or putting out the eyes of the king's subjects of malice premeditated is enacted to be felony.

This was extended to other dismembring, as cutting off ears, by 37 *H. 8. cap. 6.* but by an act of this present parliament (b) this and some other dismembrings are made felonies out of the benefit of the clergy.

By the statute of 3 *H. 5. cap. 1.* " If any person do make, buy, coin, or bring into the kingdom *Galli-half-pence, Suffkins* or *Dodkins* to sell or put them in payment in this realm, it is felony.

And by the statute of 2 *H. 6. cap. 9.* If any man pay or receive the money called *Blanks*, it is also felony; but both these are within clergy, and by the whole disuser of these coins these statutes are of little use.

By the statute of 3 *H. 5. cap. 3.* it is enacted, " That proclamation shall issue, that all *Britons* depart out of the realm before the feast of *St. John Baptist* next upon pain of loss of life and member.

But this was but a temporary law, and expired.

By the statute of 3 *H. 6. cap. 1.* it is enacted, " That no congregations or confederacies be made by masons in their assemblies, whereby the good order of the statute of *Labourers* is violated; and they that cause such assemblies to be holden shall be adjudged felons.

But the statute of *Labourers* being repealed by the statute of 5 *Eliz. cap. 4.* this law is consequentially repealed. *Co. P. C. cap. 35. p. 99.*

By the statute of 8 *H. 6. cap. 12.* It is enacted, " That if any record or parcel of the same, writ, return, panel, process, or warrant of attorney in the king's courts of chancery, exchequer, the one bench or the other, or in the treasury be willingly stolen, taken away, withdrawn, or avoided by any clerk, or by any other person, by cause whereof

8 B

the

(b) 22 & 23 *Car. 2.* whereby the cutting out or disabling the tongue, putting out an eye, slitting the nose, cutting off a nose or lip, cutting off or disabling any limb or member, if done with an intention to maim or disfigure, is felony without benefit of clergy; upon this statute *Coke* and *Woodburne* were convicted and executed for slitting the nose of *Mr. Crispe*, 8. *Geo. 1.* See *Stat. Tr. Vol. VI. p. 212.*

“ the judgment shall be reversed ; that such stealer, taker
 “ away, with-drawer, or avoider, their procurators, coun-
 “ fellows and abettors thereof indicted, and by process there-
 “ upon made duly convict by their own confession, or in-
 “ quest thereupon taken of lawful men, half whereof shall
 “ be of men of any court of the same courts, and the other
 “ half of others, shall be judged for felons ; and that the
 “ judges of the same courts, or of the one bench or the
 “ other, have power to hear and determine such defaults
 “ before them, and thereof to make due punishment, as is
 “ aforesaid.

In the consideration of this statute it will be convenient to examine, 1. How the law stood in reference to the matters aforesaid before this act made. 2. What is the import of the several parts of this act.

At the common law the undue rasure or embezzeling of a record was a great offense, for which even a judge himself was punishable by fine and imprisonment. 2 R. 3. 10. *Hengham* a judge was fined eight hundred marks for rasing the record of a fine of thirteen shillings and four pence imposed upon a poor man, and reducing it to six shillings and eight pence. (c)

By the statute of *Westm.* 1. viz. 3 E. 1. cap. 29. It is enacted, “ That if any serjeant, pleader, or other do any
 “ manner of deceit or collusion to the king’s court, or con-
 “ sent to it in the deceit of the court, or to beguile the
 “ court or the party, and be thereof attaint, he shall be im-
 “ prisoned for a year and a day, and from thenceforth shall
 “ not be heard to plead in that court.

And if he be no pleader, he shall be imprisoned in like manner, and if the trespass require greater punishment, it shall be at the king’s pleasure. (d)

(c) *Hengham* was a judge in the reign of *Edward* I. and his fine was employed for building a clock-house at *Westminster*, and furnishing it with a clock, which made *Southcot* (one of the judges of the king’s bench in the reign of queen

Elizabeth) when prest by the chief justice to consent to a rasure of the roll, say, that he would not do it, for he meant not to build a clock-house. *Co P. C.* p. 72.

(d) 2 *Co. Instit.* 213.

Upon this act it was that *Robert de Greshope* a common attorney was imprisoned for a year and a day, and banished the court of common pleas for embezzeling a part of a record, viz. T. 19 E. 1. Rot. 57. in dorso, C. B. mentiond in Co. P. C. cap. 19. p. 71. vide simile H. 22 E. 1. Rot. 33. in dorso. Cant. Coram Rege. (*)

T. 5 E. 3. Rot. 13. in dorso. Rex. B. R. *Thomas* of Carleton convict of the rasure of the word *et* in a writ is committed to the marshal, & *inhibitum est ei, ne amodo deserviat in officio sive servitio vicecom', periculo quod incumbit*, and this it seems was upon the same act of 3 E. 1. (e)

If a clerk had made a misentry of record, the judge, before whom it was, might *ore tenus* rectify that misentry, tho a considerable time after.

M. 24 E. 3. Rot. 41. Kanc. Rex. It was presented before *Richard de Kellebull* and his fellow justices of oyer and terminer 18 E. 3. that one *Warefus atte Capele* had trespassed in the free warren of the earl of *Huntingdon*, and the abbot of *Battel*, and he was convicted by his own confession, and the clerk had entred the fine ten shillings. The record being sent into the king's bench, *Richard de Kellebull* came into the court, & *inspecto irrotulamento* said, *Quod clericus suus finem illum surreptivè & contra recordum suum intravit, & dicit quod finis ille assessus fuit per ipsum & socios suos pro quolibet articulo ad decem libras, & sic finis ejusdem Warelii summatus fuit ad viginti libras, & illud expressè ore tenus hic recordatur*, and prayed for the king, *quod finis ille secundum recordum suum intretur in rotulis extractorum*, and it was accordingly entred; so that a judge of record is as it were a living record, and controls the entry of the clerk.

In the time of *Richard II.* there happend two great complaints against the judges and clerks for the misentry of a record :

(*) This was the case of *Giles de Berton*, who was convict, *eo quod scien-ter procuravit omissionem diei in processu & recorde coram justitiariis de banco, quod coram rege venire fecit*; on account of which omission the judgment of the court of common pleas had

been reversed, *pro deceptione prædicta committitur marescallo, & postea finem fecit cum domino rege pro 10 solidis.*

(e) It does not appear from the record, whether the judgment was grounded on statute 3 E. 1. or on the common law.

cord: the one *Rot. Par. 7 R. 2. pars 1. n. 57.* for the lady *Spencer*, who pleaded to a *Quare Impedit* brought against her by the king; but at the end of *Trinity* term last the record of her plea was rased in a material place to her great disadvantage, and the judges refused to amend it, because after the term: the answer was,

Tiel plee come les justices voillent recorder qe ent estoit pledez, soit de novel entre en le lieu de la rasure, nient contresteanq qe le terme, en qel le dit plee fuit pled, soit ja pass, & roy voit qe celui, qe fist le rasure, soit punish pur son malfait.

The other was *Rot. Parl. 7 R. 2. pars 2. n. 20.* at the complaint of the prior of *Mountague*, That whereas in a writ of right brought against him he prayed in aid of the king, and was ousted of aid by the court, who entred, *questum est a Priore, si quid, &c.* the judgment that was given was *dictum est Priori, quod respondeat sine auxilio*; and accordingly the judges came into parliament and agreed, that new entries should be made, as was desired by the prior, and thereupon the prior brought a writ of error in parliament upon the record so amended.

These occurrences did the next parliament following, *viz. 8 R. 2.* draw on the act of *8 R. 2. cap. 4.* against the rasing of records, and the false entring of pleas, whereby it is enacted, “ That if any judge or clerk be of default (so that by
“ the same default ensueth disherison of any of the par-
“ ties) sufficiently convict before the king and his council, in
“ that way that the king and his council shall deem reason-
“ able, within two years after the default made, &c. he shall
“ be punished by fine and ransom at the king’s will, and sa-
“ tisfy the party.

Thus this act settled it, and so it stood till *8 H. 6.* but in this act there occurred some inconveniences, 1. The way of trial before the king and council was difficult and inconvenient. 2. The punishment as to the clerks seemed too gentle. 3. It did not meet with the inconveniences of stealing records. 4. It was found of great inconvenience to the due administration of justice, for the judges have often occasion upon their own memory of the record, and sometimes upon

examination to rectify undue entries, and were required in some cases to amend the misentries or small mistakes in records by the statute of 14 E. 3. cap. 16. and other statutes, which could not be done without rasures and alterations of the record and roll.

To remedy the latter of these inconveniences in the beginning of this very statute of 8 H. 6. cap. 12. and farther by the statute of 8 H. 6. cap. 15. a liberal power is given to the justices to amend records, in the pursuance of which power they were by these acts of 8 H. 6. protected against the dangers and severity of the act of R. 2.

And then this act proceeds to inflict punishment of felony against clerks and others, that willingly avoid records, &c. which penal law did not at all extend to judges upon three apparent reasons, 1. Because by this very law judges had power upon examination to amend records. 2. Because the judges of the several courts are made the judges to hear and determine these offenses. And 3. This clause not mentioning judges, (as that of 8 R. 2. did), but beginning with clerks and other persons, judges shall not be included, who are superior officers, upon the reason given in the 2 Co. Rep. *casus archiepiscopi Cant'*, and accordingly it is agreed by my lord Coke, P. C. cap. 19. p. 72.

Now I come to the consideration of the statute itself, wherein my lord Coke, P. C. cap. 19. hath made a full collection, to which I can add little.

1. It extends only to the four great courts of *Westminster*, and not to inferior courts.

But as to the *English* part of the court of chancery it extends not, because as to the *English* proceeding it is no court of record.

But yet it seems it doth extend to those processes, that issue out of that court under the great seal, tho they be processes in order to the *English* proceeding, as *subpœna*'s, attachments, commissions to examine witnesses, because these being under the great seal are matters of record.

2. The *Treasury* is added, which doth not only extend to the records of the treasury of the courts of king's bench and

common pleas, but also to the records in the receipts of the exchequer, under the custody of the treasurer and chamberlains of the exchequer: And also to the records in the *Tower*, and in the chapel of the rolls, yea and the records in the custody of the clerk of the lords house in parliament, (but not to the journals,) for those are the king's treasuries of records of the highest moment.

3. The offenses mentiond are four, *stealing, carrying away, withdrawing, or avoiding*; and this last word *avoiding* is comprehensive, for it extends to rasing, cutting off, clipping, yea and cancelling a record.

4. But these must be done *voluntarily*, as well as *felonice*, and both these words must be containd in the indictment upon this statute.

A rasing or cancelling of a record by the order of that court, in whose custody the record is, is no felony in him that doth it, nor in the court that commands it, for the court hath a superintendence, as well over the record as over the clerks.

5. It extends not to judges for the reasons before given.

6. It must be such an embezzelling or avoiding of the record, by reason whereof a judgment is reversed, and therefore it extends only to judicial records in any of those four courts or treasuries, be the judgment in a case criminal or civil.

And therefore it is equally an offense against this statute whether the avoiding, &c. be after judgment given or before, in case judgment be given after the offense; and it is held, that an outlawry, tho it be *per iudicium coronatorum*, is a judgment within this statute.

If the judgment be not actually reversed by such embezzelling, &c. yet if it be reversible by reason thereof, it is within this statute 2 R. 3. 10.

And it extends not only to a reversibleness by writ of error, but a reversibleness or avoidableness of judgment by plea by reason of such embezzelling, &c. is within this statute 2 R. 3. 10.

But what if the offense of embezzelling, avoiding or rasing be such as goes in affirmance of the judgment, and makes

it good, which otherwise were reversible, if it stood as before that offense committed? tho this in some cases be punishable by the court as a misdemeanor in the clerk, yet it seems not felony within this act.

And the common practice at this day is, if the *Venire facias* or *Distringas* be erroneous, and would make the judgment erroneous if filed, but being not filed is aided by the statute of 18 *Eliz. cap. 14.* the court never compels the clerk to file such writs after verdict, much less punishes them for not doing it.

But if *A. B.* be sued by the original to the *exigent* and outlawed, and afterward the *exigent* is made *C. B.* and the original is also made *C. B.* to make all agree, this is felony as well in the clerk that raseth the original, as him that raseth the exigent. 2 *R. 3. 10.*

7. If the offense riseth in two counties; then it is dispensible. 2 *R. 3. 10.*

8. The trial is to be one half by the clerks of the court, and the other half by others.

9. The judges of the court of the one bench and the other are by this statute enabled to hear and determine it without any other commission, and each of these courts have a concurrent jurisdiction, and where it first begins; there it is to proceed.

So that it seemeth, if the offense were in the record of the king's bench, the justices of the common bench may hear and determine the offense, if it be there first indicted.

This power is to hear and determine, the consequence whereof is, that it enables these respective courts to take indictments of these offenses, this, tho it be intrinical to the court of king's bench, (for they swear a grand inquest and take indictments every term,) yet it is a new power in the common bench.

And altho the trial of the offense is to be by a party-jury of clerks and others, yet the indictment may be taken either of clerks alone, or of foreiners alone, or of both, for it is only the trial, that is to be by a party-jury.

In the case of *Danby* and others 2 R. 3. 10. these points were resolved upon this statute, 1. If the offense be entirely committed in the county, where the court of king's bench or common pleas sit, it may be tried, heard and determined by either court without a special commission, for the act of parliament is a commission. 2. If it be committed entirely in a foreign county, or be committed in the county where the court sits, and then the court remove into another county, it must be heard and determined in the county where the fact was committed, and cannot be indicted, heard or determined in another county than where it was done. 3. That therefore in that case there must be a special commission to the justices of the one court or to the justices of the other to hear and determine the offense in that other county, and then they may there take the indictment and try the offender by a party-jury according to the act; but it seems, if the indictment be taken by virtue of such commission, it may be removed into the king's bench by *Certiorari*, if indicted before them, and then tried according to the direction of the act. 4. If the offense were committed in *London*, where by privilege and charter of the city the mayor is to be one in commission and of the *quorum*; yet in this case the mayor must not be named in the commission, but only the justices of one of the courts. 5. If the offense be mixt, and partly in *Middlesex* where the court sits, and partly in *London* or any other foreign county, the felony is dispunishable, and so it remains at this day, notwithstanding the statute of 2 & 3 E. 6. cap. 24. 6. But yet in this case the offender committing part of the offense in *Middlesex* may be indicted of misprision of felony in *Middlesex*, or committing part of the offense in *London* may be indicted of misprision of felony in *London*, and thereupon fined and imprisoned: And accordingly it was done by the advice of all the judges, and the parties fined, for every felony includes misprision.

And yet observe, 1. The felony was one intire felony committed in two counties, and therefore neither inquirable nor determinable in one county; for the jury of that county can-

not take notice of part of the fact committed in another, and yet the misprision of that felony was inquirable and punishable in either county, where but part of the felony was committed, and yet the jury in that case must take notice of the entire felony, part whereof was committed in another county. 2. Altho the felony itself is by the act limited to special jurisdiction and manner of trial, yet the misprision of that felony was tried by a common jury and before the general commissioners of *oyer* and *terminer* in the county, where the offense was committed. In this offense the offender hath the benefit of clergy.

11 *H. 6. cap. 14.* It was made felony for three years to ship merchandizes of the staple in any creeks, but this is expired.

18 *H. 6. cap. 15.* Exportation of wools, other than to the staple of *Calais* or streights of *Morocco*, felony. *Vid. supra cap. 61. p. 642. & infra.*

18 *H. 6. cap. 19.* Soldiers departing from their captain without license, felony: this, together with those other statutes of the same kind, as 7 *H. 7. cap. 1.* 3 *H. 8. cap. 5.* I shall refer to the statute of 2 *E. 6. cap. 2.* where I shall take the whole matter of soldiers departing into consideration.

28 *H. 6. cap. 4.* It is felony to take a distress in the counties and royal seignories in *Wales* or duchy of *Lancaster*, and carry them out of the said counties, duchy or seignories, &c. saving for the lords of fees distraining. This act was to continue only five years, and then expired.

33 *H. 6. cap. 1.* If household servants after the death of their master violently and riotously take and spoil the goods of their master, and the same distribute among themselves, upon complaint made by the executors, or two of them, to the chancellor, the chancellor with the advice of the chief justices and the chief baron, or two of them, shall direct writs of proclamation to the sheriff for the offenders to appear in the king's bench upon some day certain, fifteen days at least after the proclamation.

And if he appear, he shall be committed to answer the suit of the executors by bill or writ; but if he appear not at the return of the writ after proclamation so made, he shall be attaint of felony.

This statute extends to one executor, if but one, and to administrators, if no executors, to a lord keeper of the great seal, when no chancellor.

This was a process much in use in case of great offenses, especially about this king's reign, to convict men sometimes in civil offenses, sometimes in cases criminal upon default of appearance at the return of the proclamation. *Vide Stat. 5 H. 4. cap. 6. 11 H. 6. cap. 11.*

But this attainder doth not exclude the offender from clergy. *Co. P. C. cap. 43. p. 104.*

12 E. 4. cap. 5. All wools, woolfells, morling and shorling of *Westmorland, Cumberland, Northumberland* and *Durham*, to be shipped out, shall be shipped at *Newcastle upon Tyne*, and thence to *Calais* or *Middleborough*, there to be stapled and uttered, and all other wools, woolfells, morling and shorling, to be conveyd only to the staple of *Calais*; if any attempt to the contrary, it shall be felony, saving the king's prerogative to license transportation elsewhere. This act to continue for five years only, and so it expired.

17 E. 4. cap. 1. If any shall carry or cause to be carried out of this realm or *Wales* any manner of money of the coin of this realm, or any other realm, plate, vessel, mass bullion, jewels of gold wrought or unwrought, or silver without the king's license, except the persons dispensed with by the statute of 2 H. 6. cap. 6. it shall be felony.

This act was to continue only for seven years.

And by the act of 4 H. 7. cap. 23. it was re-enacted again to continue twenty years, and by the statute of 1 H. 8. cap. 13. it was continued till the next parliament, (f) and then discontinued; but by the act of 7 E. 6. cap. 6. it was revived for twenty years, and then expired; so that at this day the exportation of gold and silver is not felony, but remains only under the penalty of those statutes, that prohibit its exportation

tion under pains of forfeiture; for the act of 17 E. 3. did not make exportation felony. (g) And having this occasion I shall here once for all give an account of the laws in force against the exportation of money and bullion.

By the statute of 9 E. 3. *cap.* 1. None are to carry any sterling out of the realm of *England*, nor silver in plate, nor vessel of gold or silver, upon pain of forfeiture of the same, that he shall so carry without the king's license; this is confirmed in substance by 38 E. 3. *cap.* 2. 5 R. 2. *cap.* 2.

By the statute of 2 H. 4. *cap.* 5. If any gold or silver be found in the keeping of any upon his passage over sea, in any ship or vessel to go out of any port or creek without the king's license, it shall be forfeit, saving his reasonable expenses.

Merchants strangers to lay out one half of the proceed of their merchandize upon *English* merchandize, and may carry over the other moiety.

By the statute of 4 H. 4. *cap.* 15. All merchants and strangers and others, that sell merchandizes here, shall lay out the money thereby arising in other merchandizes of *England*, to carry the same without carrying any gold or silver in coin, plate or mass out of this realm, upon pain of forfeiting all the same, saving always their reasonable expenses.

This act is still in force, and received a farther confirmation by the statute of 5 H. 4. *cap.* 9. 9 H. 5. *cap.* 1.

2 H. 6. *cap.* 6. No gold or silver to be carried out of the realm contrary to the former statutes, except for payment of the king's soldiers, upon pain of forfeiture of the value of the sum so carried, one fourth part to the discoverer, except ransom of prisoners, and money that soldiers carry for their necessary costs, and for horses and sheep bought in *Scotland*.

3 H. 7. *cap.* 8. All foreign merchants shall employ their money received in ports, &c. upon merchandize or commodities of this realm, the proof to lie upon the merchant, upon pain of forfeiture of all his goods, and a year's imprisonment. This clause of the statute of 17 E. 4. made perpetual.

19 H.

(g) Except in the searcher, if he confederated with any to export it.

19 *H. 7. cap. 5.* None to convey any coin, bullion or plate, above the value of 6 *s. 8 d.* out of this realm into *Ireland*, nor convey such bullion, plate or coin into any ship, boat or other vessel, upon pain of forfeiture thereof, and making fine and ransom at the king's will.

So these several statutes lie in the way of transportation of bullion or coin, tho the act of 17 *E. 4.* and other acts making it felony are now expired. (*b*)

C H A P. LXIII.

Concerning the new felonies enacted in the times of R. 3. H. 7. H. 8. E. 6. and Queen Mary.

I Find no new felony enacted in the short reign of *R. 3.* By the statute of 1 *H. 7. cap. 7.* " At every time as information shall be made of any unlawful hunting in any forest, park or warren, by night or with painted faces, to any of the king's council, or to any of the justices of peace in the county, where any such hunting shall be had, of any person so suspected thereof, it shall be lawful to any of the same council or justices of peace, to whom such information

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(*b*) By 13 & 14 *Car. 2. cap. 31.* The melting down the silver money of this realm is prohibited on pain of forfeiting it and double the value; and by 15 *Car. 2. cap. 7.* it is lawful to export foreign coin or bullion, provided an entry be made thereof at the custom-house, but by 6 & 7 *W. 3. cap. 17.* and 7 & 8 *W. 3. cap. 19.* before the same be shipped, it is necessary there should be a certificate from the

lord mayor and court of aldermen of *London*, That oath hath been made before them by the owner of the said bullion, and by two or more credible witnesses, that the said bullion and every part thereof is foreign bullion, and that no part thereof was the coin of this kingdom, or clippings thereof, or plate wrought within this kingdom.

“ formation shall be made, to make a warrant to the sheriff
 “ of the county, constable, bailiff, or other officer with-
 “ in the same county, to take and arrest the same per-
 “ son or persons, of whom such information shall be made,
 “ and to have him or them before the maker of the said
 “ warrant, or any other of the king’s said council or justices of
 “ peace of the same county ; and that the said counsellor or
 “ justice of peace, before whom such person or persons shall
 “ be brought, by his discretion have power to examine him
 “ or them so brought of the same hunting, and of the said
 “ doers in that behalf ; and if the same person wilfully con-
 “ ceal the same hunting or any person with him defective
 “ therein, that then the same concealment be against every
 “ person so concealing felony ; the same felony to be in-
 “ quired of and determind as other felonies within this realm
 “ have used to be ; and if he *then* confesses the truth, and all
 “ that he shall be examin’d of and knoweth in that behalf,
 “ that then the said offenses by him done be against the king
 “ our sovereign lord but trespasss finable, by reason of the
 “ said confession, at the next sessions of the Peace to be hol-
 “ den for the same county by the king’s justices of the same
 “ sessions to be there sessed ; and if any rescous or diso-
 “ beyance be made by any person, the which so should be
 “ arrested, so that the execution of the same warrant thereby
 “ be not had, then the same rescous and disobeyance be fe-
 “ lony inquirable and determinable, as is aforesaid ; and if
 “ any person be convict of such hunting with painted faces,
 “ vizors, or otherwise disguised to the intent he should not
 “ be known, or of any unlawful hunting in the night, then
 “ the same person so convict to have such punishment, as
 “ he should have, if he were convict of felony. (a)

My lord *Coke*, *P. C. cap. 21.* hath given us the whole learn-
 ing of this statute, *viz.*

§ F.

1. The

(a) But now by 9 *Geo. 1. cap. 22.* (continued by 6 *Geo. 2. cap. 37.*) it is made felony without benefit of clergy for any person being armed with any offensive weapons, and having their faces blacked or disguised, to appear in any forest, chase, &c. or unlawfully to hunt,

kill or steal any deer, or rob any warren, or steal fish out of any river or pond, or for any person unlawfully to hunt any deer in the king’s forests, &c. or maliciously to break down the head of any fish-pond, whereby the fish shall be lost or destroyed.

1. The hunting with vizors or painted faces in the day-time, and the hunting in the night with or without such vizors is felony ; but the party may make it trespass only, if he please. *Dy. 50. a.*

2. It doth not extend to the forest, or chase, or park of the king's, (*b*) nor to forests, parks, or warrens in reputation only, and not in right.

3. The complaint may be made to any one justice of peace or of the council, and the warrant may be granted by any one.

4. The warrant must be in writing under seal, and grounded upon an examination shewing a probable cause of suspicion.

5. When the offender is brought, he must be examined of the fact done by himself, and then of the fact done by others, but not upon oath.

6. A hunting without killing is within the penalty.

7. Tho the hunting be not felony, yet the rescue or disobedience is felony.

8. But the rescue or disobedience made felony is only that, which is done by the party, not by a stranger.

And altho the party rescue himself, yet if he be re-taken, so as execution of the warrant be had, it is no felony.

9. If the party plead not guilty, and is convicted of the fact, it is felony ; but if he confess upon his arraignment, it then becomes only a trespass finable, tho he denied it upon his first examination.

10. It is held, that if he confess not, but conceal upon his examination before the justice, this alone makes it not felony, neither can he be indicted upon this statute for such concealment ; but it must be a judicial concealment, namely, if being indicted for the hunting he upon his arraignment conceal, then he shall be indicted *de novo* for such concealment, and if convicted thereof, he shall be attaint of felony for concealment, tho this seems a difficult exposition,

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(*b*) As to this case a remedy was provided by 31 *H. 8. cap. 12.* whereby this offense, if committed in the king's forests, &c. is absolutely made felony, but

that statute being repealed by the general clause of 1 *Ed. 6. cap. 12.* a remedy was again provided by the statute of 9 *Geo. 1.* above mentioned.

tion, (c) for upon his arraignment for the hunting he only answers to that indictment, and is not examin'd touching others ; and besides, if he be indicted for the hunting, if there be evidence to convict him of the fact, he is convict of felony before the indictment for concealment come ; and if there be not evidence to convict him of the principal, how shall there be evidence to convict him of the concealment ?

11. The concealment, that makes a felony, must be a wilful concealment.

By the statute of 3 H. 7. cap. 2. It is enacted, “ That
“ whereas women, as well maidens, as widows and wives
“ having substances, some in movable goods, some in lands
“ and tenements, and some being heirs apparent to their an-
“ cestors, had been often taken by misdoers contrary to their
“ wills, and after married to such misdoers, or to others by
“ their assent, or defiled to the great displeasure of God,
“ contrary to the king’s laws and disparagement of the said
“ women, and utter heaviness and discomfort of their friends,
“ and to evil example of others, it is therefore ordained,
“ established and enacted by our sovereign lord the king, by
“ the advice of the lords spiritual and temporal and com-
“ mons in the said parliament assembled, and by authority
“ of the same, That what person or persons from henceforth
“ taketh any woman *so* against her will unlawfully, that is
“ to say, maid, widow, or wife, that *such* taking, procuring,
“ abetting to the same, and also receiving wittingly the same
“ woman *so* taken against her will, and knowing the same,
“ be felony ; and that such misdoers, takers and procura-
“ tors to the same, and receivers, knowing the same offense
“ in form aforesaid, be henceforth reputed and judged as
“ principal felons. Provided that this act extend not to any
person

(c) This difficulty arises from the aforesaid construction of the act, that it must intend a judicial concealment, whereas the act seems plainly to mean a concealment upon his examination before the justice ; for after the act had given power to the justice to examine the suspected person, it immediately adds, *and if the*

same person wilfully conceal, &c. the said concealment shall be felony, and if he then confess the truth, and all that he shall be examin'd of, his offense shall be but trespass ; the word then shows the time of confession to be at the examination, and therefore the concealment likewise must be intended to be at that time.

“ person taking any woman, only claiming her as his ward or
 “ bond-woman.

For the making of a felony within this statute there must be these circumstances on the part of the woman: 1. That the maid, wife, or widow have substance of goods or lands, or be heir apparent. 2. That she be taken away against her will. 3. That she be married to or defiled by the misdoer or some other by his consent. Without these three concurring it makes no felony within this statute, 3 & 4 P. & M. *Dalison* 22. 4. That she be not in ward, or a bond-woman to the person that taketh her, or causeth her to be taken only as his ward or bond-woman. *Co. P. C. cap. 12. p. 61.*

In *Fulwood's* case, *M. 13. Car. 1. B. R. Cro. p. 482, 484, 488, 492*, these points were resolved: 1. That if a woman be taken away forceably in the county of *Middlesex*, and married in the county of *Surry*, the fact is indictable in neither county; for the taking without the marriage, nor the marriage without the taking make not felony. 2. But if she were taken in the county of *Middlesex*, and carried into the county of *Surrey*, so that it is a continuing force in *Surrey*, tho begun in *Middlesex*, and then she is married in *Surrey*, there the offender may be indicted upon this statute in *Surrey*. 3. Tho possibly the marriage or the defilement might be by her consent, being won thereunto by flatteries after the taking, yet this is felony, if the first taking away were against her will. (d) 4. That if as well the marriage as the taking away were against her will, so that the marriage was voidable, yet it is a marriage *de facto*, and therefore being taken away against her will, and also married against her will, it is felony within this statute. 5. That it is not necessary in the indictment to say, that she was taken *ea intentione* to marry or defile her, because the statute hath no such words of *ea intentione*. But further, he marrying her the same day he took her, it must needs appear, that it was *ea intentione*; yet these words, *ea intentione ad ipsam maritand'*, are usually added in indictments upon this statute, and it is safest so to do. 6. That

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the

(d) And so it was resolved in *Sweend- p. 468.* in which case most of the other
sen's case, *M. 1 Ann. Stat. Tr. Vol. V.* points here mentiond were likewise ruled.

the woman thus taken away and married may be sworn and give evidence against the offender, who so took and married her, tho she be his wife *de facto*.

And all these points were accordingly resolved *H. 24 & 25 Car. 2.* in *Brown's* case (*e*) upon this statute, only the indictment ran, *cepit eâ intentione ad ipsam maritandam*: The offender was convicted and executed: and the reasons why the woman was sworn and gave evidence in the case of *Brown* were, 1. Because the taking away of the woman and marrying were the same day, and she was rescued out of their hands, and the offender taken the next day, and so all done *flagrante crimine*. 2. It was but a forced marriage, and so no marriage *de jure*. 3. There was no cohabitation. 4. Concurring evidence to prove the whole fact. But had she freely without constraint lived with him, that thus married her, any considerable time, her examination in evidence might be more questionable.

By the statute of *39 Eliz. cap. 9.* Clergy is taken away from the principals, procurers, and accessaries before the offense committed.

By this act of *3 H. 7.* the procurers, as well as the misdoers themselves, and any person, that receives the woman thus taken away, are principals by this statute, and so ousted of clergy; but he, that receives the offender knowingly, is only accessory after, and not excluded from clergy.

Quere, whether tho the receiver of the woman be made principal by the act of *3 H. 7.* he were intended to be ousted of clergy by *39 Eliz. cap. 9.*

The statute of *3 H. 7. cap. 14.* recites, “ That forasmuch
“ as by quarrels made to such as have been in great autho-
“ rity, office, and of council with the kings of this realm,
“ hath ensued the destruction of the kings and undoing of
“ this realm, so as it hath appeared evidently, when com-
“ passing of the death of such as were the king’s true sub-
“ jects was had, the destruction of the prince was imagined
“ thereby, and for the most part it hath grown by the ma-
“ lice of the king’s own household servants, as now of late such

“ a thing was like to have ensued; and forasmuch as by the
“ law of this land, if actual deeds be not had, there is no
“ remedy for such false compassings, imaginations and con-
“ federacies had against any lord, or any of the kings coun-
“ cil, or any of the king’s great officers in his household, as
“ steward, treasurer, comptroller, and so great inconveniences
“ might ensue, if such ungodly demeaning should not be
“ straitly punished before that actual deed were done, there-
“ fore it is ordained by the king and the lords spiritual and
“ temporal, and the commons of the said parliament assem-
“ bled, and by authority of the same, that from henceforth
“ the steward, treasurer, and comptroller of the king’s house
“ for the time being, or one of them, shall have full power
“ and authority to inquire by twelve sad men and discreet
“ persons of the chequer roll of the king’s household, if any
“ person admitted to be his servant, sworn, and his name
“ put into the chequer roll of his household, whatsoever he
“ be, serving in any manner, office or room, reputed, had
“ or taken under the state or degree of a lord, make any con-
“ spiracies, compassing, confederacies or imaginations with any
“ person or persons, to destroy or murder the king or any lord
“ of this realm, or any other person sworn to the king’s coun-
“ cil, steward, treasurer, or comptroller of the king’s house,
“ that if it be found before the said steward for the time
“ being by the said twelve sad men, that any such of the
“ king’s servants, as is abovesaid, hath confederated, compas-
“ sed, conspired or imagined, as is abovesaid, that he so found
“ by that inquiry be put thereupon to answer, and the
“ steward, treasurer and comptroller, or two or them, have
“ power to determine the same matter according to the law;
“ and if he put him in trial, that then it be tried by other
“ twelve sad men of the same household; and that such mis-
“ doers have no challenge, but for malice. And if such
“ misdoers be found guilty by confession or otherwise, that
“ the said offense be judged felony, and they to have judg-
“ ment and execution as felons attaint ought to have by the
“ common law.

Vide the observations of my lord Coke upon this act, *Co. P. C. cap. 4.* where on the part of the offender there must be these qualifications, *viz.* 1. He must be the king's sworn servant. 2. His name must be in the chequer roll. 3. He must be under the degree of a lord. 4. Tho his conspiring with another not of the household be an offense, yet he only of the household is the felon.

On the part of the person, against whom the conspiracy is, are these requisites: 1. The conspiracy to murder the king; or, 2. A lord of the realm, but yet only such as is sworn of the king's privy council. 3. Any other of the king's privy council, tho under the degree of a lord. 4. The steward, treasurer, or comptroller of the king's house, tho neither a lord nor of the privy council.

The power to hear and determine. 1. The steward, treasurer and comptroller, [or any two of them, have power to determine,*] tho the act saith, they or any one of them may inquire. 2. If a servant of the king's house, *ut supra*, conspire the death of the steward, treasurer and comptroller; yet they remain the only judges in this cause by this act, tho they may take others to their assistance, yet none but they sit as judges. 3. The presentment and trial must be only by the servants of the household. 4. The inquiry may be by twelve or more, but the trial only by twelve. 5. No challenge but for malice. 6. The conspiracy must be plotted in the king's household. 7. The offender is to have his clergy.

And *note*, this being a new made felony, and the manner of its determination particularly limited, it is not determinable before any other judges, or in any other courts, neither in the king's bench, oyer and terminer, or gaol-delivery. *Quere*, whether their session must not be in the king's house.

By the statute of 7 *H. 7. cap. 1.* There is provision of felony against captains and soldiers leaving their service; but this I shall take up hereafter, as also the statute of 3 *H. 8. cap. 5.* which I shall refer to 4 & 5 *P. & M. cap. 3.*

I come

* The words here in the MS. are, *Or any one or any two of them have power to inquire*, but they seem plainly to have been so written by mistake, the sense requiring them to be as above.

I come to the time of *H. 8.* which was fruitful in enacting new treasons and new felonies, and new offenses as to *Premunire*.

But there were two acts of parliament, that repeald as all new treasons and misprisions of treasons, so all new felonies enacted at any time after the first day of the reign of *Henry 8. viz.*

1 *E. 6. cap. 12.* Whereby it is enacted, “ That all offenses made felony by any act or acts of parliament made since the 23d day of *April* in the first year of the reign of king *H. 8.* not being felony before, and also all and every the branches and articles mentiond, or in any ways declared in any of the said statutes concerning the making of any offense or offenses to be felony, not being felony before; and all pains and forfeitures concerning the same or any of them shall from henceforth be repeald, and utterly void and of none effect.

1 *Mar. cap. 1.* Whereby it is enacted, “ That all offenses made felony, or limited to be within the case of *Premunire*, by any act or acts of parliament, statute or statutes made since the first day of the first year of the reign of king *Henry 8.* not being felony before, nor within the case of *Premunire*, and all and every branch, article and clause mentiond, or in any ways declared in any of the said statutes concerning the making of any offense or offenses to be felony, or within the case of *Premunire* before, and all pains and forfeitures concerning the same or any of them shall from henceforth be repeald and utterly void, and of none effect.

The former of these statutes, and also the latter repeald all new felonies enacted in the time of *H. 8.* who began his reign *April 22. 1509.* And the latter of these statutes repeald also the new created felonies in the reign of *E. 6.*

But neither of these statutes did extend to piracy or robbery upon the sea, nor any such act as concerned matter of proceedings touching felonies, that were such before the time of *H. 8.* and therefore those statutes in the time of *H. 8.* that concerned clergy, sanctuary, peremptory challenge, place or

manner of trial of felons, or the erecting of new jurisdictions for their trial, as that of 33 *H. 8. cap. 12.* for felonies in the king's court; for these acts were not constitutive of new felonies, but only directions of the course of proceedings in cases of old felonies.

Those statutes, that made new felonies both in the time of *H. 8.* and *E. 6.* are therefore of these kinds, *viz.*

1. Such as were enacted *de novo* in the times of *H. 8.* and *E. 6.* and were never after revived or re-enacted by any subsequent act of parliament; such were those of 31 *H. 8. cap. 2.* of breaking the heads of ponds, and taking fish, 31 *H. 8. 12.* and 32 *H. 8. cap. 11.* stealing of hawks eggs, and hunting in the king's forests, &c. 33 *H. 8. cap. 2.* of witchcraft. 33 *H. 8. cap. 14.* of prophecies. 37 *H. 8. cap. 6.* The burning of a frame of timber. 37 *H. 8. cap. 10.* Libellous papers charging men to have spoken treason. 23 *H. 8. cap. 11.* Breaking prison.

2. Such as were repeal'd but enacted again in the same kind, but with some alterations, as 22 *H. 8. cap. 10.* concerning *Egyptians*, altered by 1 & 2 *P. & M. cap. 4.* and by 5 *Eliz. cap. 20.*

3. Such as were *de novo* enacted to be felonies in the times of *H. 8.* and *E. 6.* and repeal'd, but re-enacted again, as 22 *H. 8. cap. 11.* touching cutting of *Powdike*, renewed by 2 & 3 *P. & M. cap. 19.* 3 *H. 8. cap. 5.* concerning soldiers, re-enacted in a great measure by 2 *E. 6. cap. 2.* and 4 & 5 *P. & M. cap. 3.* 21 *H. 8. cap. 7.* servants embezzling their masters goods, by 5 *Eliz. cap. 10.* 25 *H. 8. cap. 6.* concerning buggery, by 5 *Eliz. cap. 17.* 23 *H. 8. cap. 16.* concerning *Scotchmen*, re-enacted by 1 *Eliz. cap. 7.* but finally repeal'd by 4 *Jac. 1. cap. 1.*

4. Some offenses were made felony by former acts of parliament before *H. 8.* but had additions to them, extending the felonies farther than the old acts, some such thing may be found in the statute of 3 *H. 8. cap. 5.* concerning soldiers in relation to the statute of 7 *H. 7. cap. 1.* and then the old felonies stand, but the additional felonies are repeal'd.

Concerning the first of these ranks of acts I shall say nothing, because they are now utterly void ; but concerning the other three ranks of statutes, I shall proceed according to their order of time.

First, for the statute of 3 *H. 8. cap. 5.* as also that of 2 *E. 5. cap. 2.* concerning soldiers, I shall refer them to the statute of 4 & 5 *P. & M. cap. 18.*

By the statute of 21 *H. 8. cap. 7.* It is enacted, “ That
 “ all and singular servants, to whom any caskets, jewels, mo-
 “ ney, goods or chattels by his or their masters or mistresses
 “ shall from henceforth be delivered to keep, that if any such
 “ servant or servants withdraw themselves from their masters
 “ or mistresses, and go away with the said caskets, jewels,
 “ money, goods or chattels, or any part thereof, to the in-
 “ tent to steal the same and defraud his or their masters or
 “ or mistresses thereof, contrary to the trust and confidence
 “ to him or them put by his or their masters or mistresses,
 “ or else being in the service of his or their master or mi-
 “ strefs, without any assent or commandment of his master
 “ or mistress, embezzle the same caskets, jewels, money,
 “ goods or chattels, or any part thereof, or otherwise con-
 “ vert the same to his own use with like purpose to steal it,
 “ that if the said casket, jewel, money, goods or chattels, that
 “ any such servant shall go away with, or which he shall
 “ embezzle with purpose to steal, as aforesaid, be of the va-
 “ lue of forty shillings, or above, that then the same false,
 “ fraudulent, or untrue act and demeanor shall from hence-
 “ forth be deemed and adjudged felony, &c. Provided it ex-
 “ tend not to apprentices, nor to any person under the age
 “ of eighteen years ; but every such apprentice or person
 “ within that age doing that act shall be and stand in the
 “ like case, as they were before the making of this act. This
 “ act to endure till the next parliament.

By the act of 27 *H. 8. cap. 17.* Clergy was taken away in this case, if the indictment were laid specially upon the act of 21 *H. 8.* and pursuant to the same ; and by the act of 28 *H. 8. cap. 2.* this act of 21 *H. 8.* was made perpetual, but by the act of 1 *E. 6. cap. 12.* these acts were both repeald.

But again, by the act of 5 *Eliz. cap.* 10. this act of 21 *H. 2.* was re-enacted and revived, yet it did not revive the act of 27 *H. 8. cap.* 17. for taking away clergy. 1. Because the words of the reviving act of 5 *Eliz.* revive only the act of 21 *H. 2.* specially and particularly by name, and not any other incident act concerning clergy. And again, 2. Because the acts taking away clergy were specially repealed by the statute of 1 *E. 6. cap.* 12. except in those cases there particularly enumerated, so that at this day a party indicted and convicted upon this statute hath his clergy. (*f*)

And *note*, that in this case and all other cases of this nature, where a statute is repealed and re-enacted, an indictment or information may conclude either *contra formam statutorum*, or *contra formam statuti*, for it shall be intended the last statute. And so it is, if a statute be but temporary and then expire, and then is re-enacted; but if a statute be continued till the end of the next session of parliament, and before that next session be ended it is continued over, the indictment may run *contra formam* of the first statute, for it never was interrupted, or it may conclude *contra formam statutorum*. P. 42 *Eliz. B. R. Dingly and Moore*, (*g*) M. 31 & 32 *Eliz. B. R. Mill's case*.

This statute was introductive of a new law, when the goods were actually delivered to the servant, that goes away with them, for where there is such a delivery it could not at common law be a felony.

But yet a servant might be guilty of felony at common law, if he take the goods of his master feloniously, nay tho they be goods under their charge, as a shepherd, butler, &c. *vide supra, cap.* 43. p. 505. and for this he may be indicted at this day as a felony at common law; and of this felony at common law, an apprentice, or servant under the age of eighteen years may be guilty, and indicted thereof at common law.

And therefore tho the statute of 21 *H. 2.* exempt an apprentice, or servant under the age of eighteen years from the

(*f*) But by 12 *Ann. cap.* 7. Clergy is in such case taken away from facts committed in any house or outhouse, except as to apprentices under the age of fifteen years, robbing their masters.

(*g*) *Cro. Eliz.* 750.

the pain of felony enacted *de novo* by this statute, namely, where goods are actually deliverd to him, yet it leaves him in the same condition, as to any felony at common law, as if he were not excepted; and therefore if my butler or shepherd under the age of eighteen years, or if my apprentice take away my goods feloniously without my actual delivery, tho they are under the value of forty shillings, he is indictable of felony at common law.

If I deliver my servant a bond to receive money, or deliver him goods to sell, and he receive the money upon the bond or goods, and go away with it, this is not felony at common law, because the money is deliverd to him, nor felony by this statute, because, tho the bond or goods were deliverd him by the master, yet the money was not so deliverd by the master. *Dy. 5. a. Co. P. C. cap. 44.* And yet by the very payment of the money to the servant to the master's use, the master is by law said to be actually possessed of this money; and if taken away from the servant by a trespasser or robber, the master may have a general action of trespass, or action upon the statute of hue and cry.

But it is held, that if the master deliver to the servant twenty pounds in silver to change it into gold at the goldsmith's, or leather to make shoes, and he run away with the gold or shoes, it is felony. *Crompt. Justic. 35 b.*

If *A.* hath two servants, *B.* and *C.* *B.* by the command of *A.* the master and in his presence delivers the master's goods to *C.* by the master's command, and *C.* runs away with it, this is felony within the statute, for it is the master's delivery; but suppose it be deliverd by the master's command, but in the master's absence, *quare*, whether this be within the statute, and what difference there is between this case and the receiving money from a creditor by the master's directions, yet *vide Dy. 5.* it seems felony.

If the master's wife deliver goods of the master to the servant to keep, and he goes away with it, it seems this is within the statute, for he hath them by delivery of his mistress, and the master's wife is as well his mistress, as if she were sole, *vide* statute 25 *E. 3.* for petit treason.

By the statute of 22 *H. 8. cap. 11.* Every perverse and malicious cutting down of the new *Powdike* of *Marshland*, or of the old *Powdike* of the isle of *Ely*, or of any part thereof, or of any other bank, being part of the rind and uttermost part of the country of *Marshland*, made for the defense thereof, other than working upon the same for repairing or amending and fortifying thereof; is enacted to be felony.

This act was repealed by 1 *E. 6. cap. 12.* and 1 *Mar. cap. 1.* but is revived by 2 & 3 *P. & M. cap. 19.* and so continues.

But the offender hath the benefit of clergy.

By the statute of 23 *H. 8. cap. 16.* The selling of a horse to a *Scotchman*, or delivering a horse in *Scotland* is made felony.

This was repealed by 1 *E. 6. cap. 12.* and tho made penal by the act of 1 *E. 6. cap. 5.* yet never revived, (b) and the acts of this kind are repealed by 4 *Jac. 1. cap. 1.* as to *Scotland.*

By the act of 25 *H. 8. cap. 6.* buggery with mankind or beast is enacted to be felony, and the felon excluded from clergy.

This statute was repealed by the general act of 1 *E. 6. cap. 12.* and in 2 *E. 6. cap. 29.* it was enacted to be felony without clergy, but without loss of lands or goods or corruption of blood.

But this act of 2 *E. 6.* was repealed by the statute of 1 *Mar. cap. 1.* and so both acts stood repealed until 5 *Eliz.*

But by the statute of 5 *Eliz. cap. 17.* the entire act of 25 *H. 8. cap. 6.* is revived and re-enacted, so that this offense stands at this day absolutely felony without benefit of clergy.

To make buggery there must be *penetratio*, as in case of rape. *Vide supra, p. 628.*

A woman may be guilty of buggery with a beast within this statute.

§ H

If

(b) This must be some mistake in the MS. for this statute was revived, as our author himself says a little above, *p. 665.* by 1 *Eliz. cap. 7.* tho afterwards repealed by 4 *Jac. 1. cap. 1.*

If buggery be committed upon a man of the age of discretion, both are felons within this law.

But if with a man under the age of discretion, *viz.* fourteen years old, then the buggerer only is the felon.

Those, that are present aiding and abetting, are all principals; the statute making it felony generally, there are or may be accessaries before and after, as in case of rape. But tho none of the principals are admitted to their clergy, yet accessaries before and after are not excluded from clergy.

Touching the time of *E. 6.* I do not find any new felony enacted, but that of 2 & 3 *E. 6. cap. 6.* which I shall hereafter consider, when I come to 4 & 5 *P. & M. cap. 3.*

In the time of queen *Mary* we find these statutes following making new felonies.

By the statute of 1 & 2 *P. & M. cap. 4.* “ If any outlandish people calling themselves or being called *Egyptians* shall remain in this realm or *Wales* one month at one or several times. And if any person being fourteen years old, which hath been seen or found in the fellowship of such *Egyptians*, or which hath disguised him or herself like them, shall remain here or in *Wales* one month either at one or several times, it is felony. (*i*)

The trial to be by the inhabitants of the county, where they are taken, and not *per medietatem lingue*, no sanctuary or clergy to be allowed.

A proviso, that it extend not to their children under thirteen years old.

And by the statute of 5 *Eliz. cap. 20.* the act of 1 & 2 *P. & M.* is confirmed and extended to all above the age of fourteen years, that shall be found in the company of vagabonds, commonly called or calling themselves *Egyptians*, or counterfeiting or disguising themselves by their apparel, speech or behaviour like them, if they continue one month, altho they are persons born in the king's dominions. Clergy is ousted.

4

I have

(*i*) Our author has here copied from *Co. P. C. cap. 39.* where the two statutes of 1 & 2 *P. & M.* and 5 *Eliz. cap. 20.* are blended together; for this last clause

and the words *at one or several times* in the first clause belong to 5 *Eliz.* and not to 1 & 2 *P. & M.*

I have not known these statutes much put in execution; only about twenty years since at the assizes at *Bury* about thirteen were condemned and executed for this offense.

I am now come to that, which I have all along promised, namely, the felony of soldiers running from their captains, enacted by several statutes, as namely, 18 *H. 6. cap. 19.* 7 *H. 7. cap. 1.* 3 *H. 8. cap. 5.* 2 & 3 *E. 6. cap. 2.* repealed by 1 *Mar. cap. 1.* and revived by 4 & 5 *P. & M. cap. 5.* and the statute of 5 *Eliz. cap. 5.*

I shall take up the whole matter together, beginning with the antienter statutes, and so descending downwards to the latter.

By the statute of 18 *H. 6. cap. 18.* It is recited, “ That
“ divers captains, that were retained by indenture to serve the
“ king, some beyond the seas and some in the marches, had
“ defrauded the soldiers under their retinue of their pay,
“ and enacts, that no captain, which shall have the conduct
“ of such retinue, and shall receive the king’s wages for the
“ same, shall abate his soldiers their wages, except it be for
“ their clothing, that is to say, if they shall be waged for
“ half a year, ten shillings a gown for a gentleman, six shil-
“ lings and eight pence for a yeoman, upon pain to forfeit
“ twenty pounds for a spear, ten pounds for a bow to the
“ king, for whom he did abate.

And by the statute of 18 *H. 6. cap. 19.* It is recited and enacted, as followeth, “ Whereas many soldiers, which
“ have taken parcel of their wages of their captains, and so
“ have muster’d and been entred of record the king’s sol-
“ diers before his commissioners for such terms, for which
“ their masters have indented, have sometimes presently af-
“ ter their muster and receiving part or all of their wages
“ departed and gone where they will, and have not passed
“ the sea with their captains, and some passed the sea, and
“ long within their terms departed from their captains and
“ the king’s service without apparent license to them grant-
“ ed by their captains, to the great damage, &c. it is enact-
“ ed, that every man *so* (k) mustering and receiving the king’s
wages,

(k) This word [*so*] restrains the statute to soldiers retained in the manner mentioned in the act, which method of retention being now disused, this statute is consequently become of little force.

“ wages, which departeth from his captain within his term
 “ in any manner aforesaid, (except notorious sickness by the
 “ visitation of God suffer him not to go, and which he shall
 “ certify presently to his captain, and repay his money, so
 “ that he may provide him for another soldier in his place,)
 “ he shall be punished as a felon, and the justices of the
 “ peace shall have power to hear and determine the same; and
 “ that no soldier, man of arms or archer so mustered of re-
 “ cord and going with his captain beyond the sea shall re-
 “ turn into *England* within the term for which his captain
 “ hath retained him, nor leave his captain there in the king’s
 “ service, and in adventure of the war, except he hath rea-
 “ sonable cause by him shewed to his captain, and by him
 “ to the chief in the country having royal power, and there-
 “ upon shall have a license of the said captain witnessed under
 “ his seal, and shewing the cause of his license; and if any
 “ that doth muster of record come without letters testimonial
 “ of his captain within his term on this side the sea, the may-
 “ ors, &c. shall arrest them, and detain them until it be in-
 “ quired of, and if it be found by inquiry before the justice
 “ of peace, and proved, that they have mustered of record
 “ and departed from their captains without license, as afore-
 “ said, they shall be punished as felons.” But it took not
 away clergy.

By this act it appears, that the method of those times
 was, that as well the soldiers as the captains were under a
 contract to serve in the war, some for longer time, some for
 shorter, and sometimes the subordinate soldiers contracted
 with the king, but most commonly the captain contracted with
 the king to serve him with such a number of men raised by
 himself for such a time, as half a year or the like, and the
 captain made his contract with his soldiers (therefore called
 his retinue), and the captain received the pay for himself and
 them.

And this method continued until 7 H. 7. and for a long
 time after, as appears by the whole preamble and body of the
 statute of 7 H. 7. cap. 1.

By that statute it is enacted, “ That every captain and
“ petit captain having under them retinue of any foldier or
“ foldiers at the king’s wages shall, under pains in the same
“ act limited, pay to their retinue of foldiers their wages rate-
“ ably, as it is allowd by the king or the treasurer of his
“ wars, and that within six days next after they have re-
“ ceived it ; and if any foldier, being no captain, imme-
“ diately retaind with the king, which hereafter shall be in
“ wages and retaind, or take any *prest* to serve the king
“ upon the sea or upon the land beyond the sea, depart
“ out of the king’s service without license of his captain,
“ that such departing be felony without the privilege of cler-
“ gy ; and the justices in every shire, where such offender is
“ taken, shall hear and determine the offense, as if done in
“ the same county ; and their departure and retainer, if tra-
“ versed, shall be tried in the same county, where taken.”
But this act extended not to foldiers imprested to serve in
England.

By this statute it appears, that the retainer of the captain
was by contract with the king, and he by the same contract
was to provide the foldiers, which were to be at the king’s
pay. This is continued also till 3 *H. 8.* as appears by the
preamble and body of the act of 3 *H. 8. cap. 5.*

By that act of 3 *H. 8. cap. 5.* The same punishment is
enacted upon foldiers departing without license, only here it
is without license of the king’s lieutenant.

By the statute of 7 *H. 7.* It is receiving wages or *prest* to
serve the king upon or beyond the sea, here it is to serve
the king upon the sea, or upon the land, or beyond the sea,
which is larger than 7 *H. 7.* for it extends to land service,
and the punishment is limited to the justices of the peace of
the counties where taken.

Provido, that it extend not to captains or foldiers retaind
to serve in *Calais, &c. Berwick* or *Wales.*

It is resolved 6 *Co. Rep. 27. a.* in the case of foldiers, that
both these statutes have continuance, and the word (*king*)
extends to the successors of those kings, (*m*) and altho by

the statute of 1 E. 6. and 1 Mar. all new felonies made since the first day of the reign of H. 8. that were not felonies before, are repeald, yet inasmuch as the statute of 3 H. 8. enacts no new felony, but what was felony by 7 H. 7. cap. 1. tho it vary as to the person, that is to grant the license, and the persons that are to try it, (*) yet it was in truth no new felony, and therefore it is held the statute of 3 H. 8. was not repeald by 1 Mar. or 1 E. 6.

But it seems to me to be repeald by 1 E. 6. and 1 Mar. for to depart without license of the captain, and to depart without license of the king's lieutenant, are several offenses, for suppose he had the lieutenant's license and not the captain's, it is not excuse enough within 7 H. 7. and if he had the captain's license and not the lieutenant's, it excuseth not within the statute of 3 H. 8. But then *quare*, whether the exception for clergy of men in orders, or of soldiers in *Calais*, *Berwick*, or *Wales* extend to the statute of 7 H. 7. cap. 1.

If this variance by the statute of 3 H. 8. be a repeal of the statute of 7 H. 7. then they are both repeald, that of 7 H. 7. by 3 H. 8. and that of 3 H. 8. by 1 E. 6. and 1 Mar.

The statute of 2 & 3 E. 6. cap. 2. recites, " That whereas
 " divers of the king's subjects according to their bounden
 " duties have appointed and sent into the parts beyond the
 " seas and into *Scotland* many able persons and soldiers with
 " horses and harness meet to serve the king in his wars to
 " their great charges and costs, yet some of the soldiers so
 " sent have contrary to their bounden duty sold or converted
 " the said horses and harness, whereby the king hath
 " been destitute of their service, and the owners who sent
 " them have been deceived of their horses and harness, and
 " less able to refurnish other like soldiers with horses and
 " harness at such time as they shall be commanded by the
 " King.

It is enacted, " That if any soldier hereafter serving the
 " king in his wars in any of his dominions, or on the seas,
 " or beyond the seas, shall hereafter purloin, &c. such horses
 " or arms, he shall be committed by the lieutenant, &c.
 " upon

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(*) The persons impowred to try it are the same by both statutes.

“ upon due proof or testimony till satisfaction, &c. And if
“ any soldiers serving, as is aforesaid, depart without license of
“ his lieutenant or other above-named with booty or other-
“ wise, being in the enemies country or elsewhere in the
“ king’s service, or out of any garison, where he or they be
“ appointed to serve, that then every such soldier so depart-
“ ing without license shall be taken and judged as a felon
“ without benefit of clergy or sanctuary; and the justices of
“ every shire, where he is taken, shall have power to hear
“ and determine the offense, as if committed in the same
“ county.

“ Provisions against captains short pay, &c. Provided not
“ to extend to detaining of wages for victuals, harness, wea-
“ pons, or for any *prest* money provided and delivered to such
“ soldier.

Nota, This act, tho it vary from the preamble of the other acts of 7 H. 7. and 3 H. 8. and recites, that the king’s subjects according to their *bounden duty* had sent men and soldiers, doth not necessarily infer a compulsive power upon the persons so to send, or so to go; 1. Unless they were bound by tenure to attend in person or send; such were tenants by knights service. (n) 2. Unless obliged by the statute of 11 H. 7. cap. 18. or 19 H. 7. cap. 1. as having offices, pensions, or lands given by the king, who by these statutes were bound to follow the king in his wars, but at the king’s wages, by those statutes, which were held perpetual. 3. Or unless they had contracted with the king to find him soldiers, for this course was not wholly out of use, and the preamble seems to import as much, for they sent their soldiers, and when they thus departed with their arms were bound to refurnish others.

And tho there be mention of *prest* money in this act, yet in truth it was *imprest* money, or the earnest of the contract between the king by the captain and the soldiers, and not as is now used.

But yet upon this act two things are observable. 1. That this act did not make the departure of any soldier to be felony,

(n) See Co. Lit. p. 76. a. § 103.

lony, unless he were actually in the king's service in his wars. 6 Co. Rep. 27. a. case of soldiers.

2. Tho this felony was in substance the same, that was enacted by 7 H. 7. yet the general clause of the act of 1 Mar. cap. 1. repeald it.

And this is accordingly so recited by the statute of 4 & 5 P. & M. cap. 3. which doth recite it to be repeald, and therefore by an exprefs enacting clause renews that clause of the statute of 2 & 3 E. 6. that makes such departure felony.

By the statute of 5 Eliz. cap. 5. It is recited, " That it hath been doubted, whether the statute of 18 H. 6. cap. 19. did or ought to extend to mariners and gunners serving on the seas taking wages of the king or queen. It is expressed, ordained, and enacted and declared, that the said statute in all pains, forfeitures and other things did and doth, and hereafter shall extend as well to all and every mariner and gunner having taken, or that shall hereafter take *prest* or wages to serve the queen, her heirs or successors, to all intents and purposes, as the same did or doth to any soldier, any diversity of opinion, doubt, or matter to the contrary notwithstanding." But this takes not away the benefit of clergy.

In 6 Co. Rep. 27. a. The case of soldiers. The case was, that divers soldiers after they were prest, and going towards *Ireland* to serve against the rebels there, and before they had served in the war, did depart and *esloigne* themselves; hereupon it was resolved by all the judges of *England* 43 Eliz. upon a reference to them made, as it seems, 1. That this case was not within the statute of 18 H. 6. but that act is now of little use, because that act refers to the antient manner of retaining soldiers, which was usual between the king and great men, to serve the king with such a number of men for a certain time. 2. That the statute of 2 & 3 E. 6. cap. 2. revived by 4 & 5 P. & M. extended not to this case, for that statute extended to the departure of a soldier after he had been in actual service in the war. 3. That the statutes of 7 H. 7. cap. 1. and 3 H. 8. cap. 5. which in substance are

both of one effect, are perpetual laws, and the word *king* extends to his successors, and upon those two acts divers soldiers were attaint and executed.

The reason thereof cannot be grounded upon any supposition, that the course of military retainers was altered in 7 *H. 7.* from what it was in the time of *H. 6.* for there are very many indentures of retainers of record according to the ancient form long after that time, and indeed the statutes of 7 *H. 7.* and 3 *H. 8.* do import as much, as will easily appear to an attentive reader of them: But that which seems to extend the acts of 7 *H. 7.* and 3 *H. 8.* to this case, are the words *or take any prest to serve the king*, which words are in these statutes and in that of 5 *Eliz. cap. 5.* which are wanting both in the statute of 18 *H. 6. cap. 19.* and 2 & 3 *E. 6. cap. 2.* for that makes them subject to the penalty for departing without license, as well as if they had received wages, or had been mustered, or been in actual service in the wars.

All the difficulty rests in the word *prest*, *viz.* whether it be to be intended passively from *premo, pressi*, as it is commonly used at this day, and is so express in the case of soldiers, *Après ceo quilz fueront prest*: Or whether to be taken actively, as it is express in the statutes of 7 *H. 7.* 3 *H. 8.* and 5 *Eliz. having taken prest to serve, &c. prestitum*, or the earnest of their contract (o).

All do agree, that if a man do voluntarily receive or take *prest* to serve as a soldier, mariner, or gunner, either upon or beyond the seas, he is bound thereby, and if he depart

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without

(o) Whatever doubts may formerly have been about the meaning of the word *prest*, yet it seems now to be fixt to the latter sense by 5 & 6 *W. & M. cap. 15.* for it is there enacted, "That no person, that shall be listed for the land service, should for the future be esteemed a listed soldier, or be subject to the penalties of this act, or any other penalty for his behaviour as a soldier, unless before his being listed or inserted in any muster-roll he shall have been brought before a justice of peace, (not being an officer in the army,) or chief

" magistrate of some city, or high constable of the hundred or division, where the party shall be listed, and before such justice, &c. shall declare his free consent to be listed as a soldier." Altho the former clause of this statute for reviving the punishment of mutiny or desertion be limited to the time mentioned in the act, yet this clause coming after that limitation, and being general not only in relation to the penalties of this act, but of any other act, seems to be perpetual.

without license, it is felony within the statute of 7 H. 7. cap. 1. 3 H. 8. cap. 5. and 5 Eliz. cap. 5. for the words of the statutes are express in it, only in the case of a soldier it is without benefit of clergy, but of a mariner or gunner it is within benefit of clergy, because the statute of 18 H. 6. cap. 19. doth not exclude clergy, and the statute of 5 Eliz. extends only the statute of 18 H. 6. to mariners and gunners, and mentions nothing of the statutes of 7 H. 7. or 3 H. 8. which exclude clergy. But of the business of clergy hereafter in this chapter.

But on the other side the compulsion of men to go beyond or upon the sea, or otherwise imprisoning of them, or compelling men to take *prest* money, or otherwise to imprison them hath been, I confess, a practice long in use; how far it is justifiable or not, the books that have treated of it are to be consulted. *Vide* the argument of *Calvin's case*, 7 Co. Rep. 7. b. He, that reads the comment of my lord *Coke* upon *Confirmatio Cartar.* cap. 5. and his observations and conclusions there upon the statutes of 1 E. 3. cap. 5. & 7. (p), 18 E. 3. cap. 7. (q), 25 E. 3. cap. 2. (r), 4 H. 4. cap. 13. (f), may reasonably think he varied his opinion (t). And he, that looks upon the acts enabling pressing of soldiers and mariners for foreign service upon or beyond the sea, namely 17 Car. 1. cap. 12. cap. 25. cap. 26. may think that those times made some

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(p) This statute provides, that no man shall be charged to arm himself otherwise than was formerly wont, and that no man be compelled to go out of his shire, but where necessity requireth, and sudden coming of strange enemies into the realm.

(q) This statute ordains, that men of arms, &c. chosen to go in the king's service out of *England* shall be at the king's wages, till their coming again.

(r) This statute enacts, that no man shall be constrained to find men of arms, other than those who hold by such service, except it be by common assent in parliament.

(f) The design of this statute is chiefly to confirm the three acts above mentioned.

(t) In *Calvin's case* he was of opinion, that the subject is bound to serve the king in his wars both within and without the realm; and in his comment upon *confirmatio cartar.* cap. 5. 2 *Instit.* 528. he says, that the statutes above mentioned, (which provide, that none shall be compelled to go to the king's war out of his shire, except in case of necessity, nor shall be constrained to find men of arms, except by consent of parliament,) were but declarations of the antient law of *England*. And again, in his comment on *Magna Charta*, cap. 29. 2 *Instit.* 47. he says, that the king cannot send any subject against his will to serve him out of the realm, not even into *Ireland*, for then under pretense of service he might send him into banishment.

some doubt of it (*u*). But of this matter I deliver no opinion (*x*). Howsoever to make a felony within those acts of 7 *H.* 7. *cap.* 1. 3 *H.* 8. *cap.* 5. 5 *Eliz.* *cap.* 5. it must be laid in the indictment and proved upon evidence, 1. That either they received wages, or took *prest* to serve the king upon sea or land. 2. That he, that thus imprested them, was commissioned by the king so to imprest them.

Touching clergy in these offenses.

1. He that is convicted upon the statute of 18 *H.* 6. *cap.* 19. shall have his clergy. *Co. P. C. cap.* 26.

2. Consequently a mariner or gunner, that hath taken wages or prest, shall have his clergy, for the statute of 5 *Eliz.* *cap.* 5. extends only the pains and penalties of the statute of 18 *H.* 6. to this case, and by that statute of 18 *H.* 6. clergy was not taken away.

3. That a departing contrary to the statute of 7 *H.* 7. or 3 *H.* 8. is by those statutes exempted from clergy, only the statute of 3 *H.* 8. *cap.* 5. allows men in orders the benefit of clergy.

4. The statute of 2 & 3 *E.* 6. takes away clergy from those, that depart without license after they have served the king in his wars.

5. By the statute of 1 *E.* 6. *cap.* 12. All persons convicted of any felony not excepted in that act, whereof this is none, shall have their clergy, as he might have had before 24 *April*, 1 *H.* 8. and therefore an offender against 7 *H.* 7. *cap.* 1. is ousted of his clergy, because ousted thereof by 7 *H.* 7. *cap.* 1. only if they be in orders, they have privilege of clergy by the statute of 3 *H.* 8. *cap.* 5.

6. But

(*u*) Or rather were clear, that it could not be legally done without a special act of parliament for that purpose; the like may be argued from some other temporary statutes enacted since our author's time, for authorizing the pressing of soldiers and mariners, *viz.* 2 & 3 *Ann. cap.* 19. 3 & 4 *Ann. cap.* 11. 4 *Ann. cap.* 10. 5 *Ann. cap.* 15. 6 *Ann. cap.* 10.

(*x*) But it may be easily perceived, that the reason why our author declines

delivering any opinion was, because he did not concur with the then prevailing practice, a practice which seems repugnant to the liberties of an *Englishman*, and irreconcilable to the established rules of law, *viz.* that a man without any offense by him committed, or any law to authorize it, should be hurried away like a criminal from his friends and family, and carried by force into a remote and dangerous service.

6. But if he be indicted upon the statute of 3 H. 2. cap. 5. *quere*, whether he shall not have his clergy, for tho the felony in substance be the same, yet this statute makes it felony to depart without the license of the king's lieutenant, but the statute of 7 H. 7. cap. 1. makes it felony to depart without license of the captain, and therefore *vide supra*, p. 674. whether 3 H. 2. be not repealed by 1 E. 6. as a felony newly made since the first day of the reign of H. 2.

If a man receive impress to serve the king beyond the sea, and is deliverd over to a conductor to be brought to a certain place at the sea-side, and is in the king's wages, and runneth away without license of the conductor, all besides [Croke,] *Yelverton*, and *Hutton*, agreed it to be felony, and the conductor is as to this purpose a captain; but all agreed, that if the conductor at the place deliver him over to another conductor, this second conductor is not a captain within the statute (y); but *Yelverton* and *Hutton* held, that in neither case it is felony, unless the conductor be also a captain, and so named in the indenture between the king and him, which all agreed to be the safest way.

It was held, that it could not be tried before other justices, than such as are limited by the act, because a new felony, and limited to be tried in another manner than the law directs, *viz.* in the county where taken. *M. 3 Car. Hutt. Rep. 134.* nine judges *versus Croke, Hutton, and Yelverton, vide Cro. Car. 71.* the better [greater] opinion was, that it was felony and may be tried before justices of oyer and terminer or gaol-delivery, as well as of the peace.

But surely the press-masters or constables, that usually take up men for service, are not captains within the act, neither is the running from them felony within these statutes (z).

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There

(y) The resolution here did not distinguish between a first and second conductor, but between a conductor, who by agreement with the captain had the leading them quite thro to the place of rendezvous, and one who was hired to carry them part of the way, and then deliver them to another conductor; a conductor of this last sort, whether first

or second, it was agreed was not a captain within the statute. See *Hut. 134.*

(z) These several acts of parliament enacted for the punishment of soldiers running away from their captains are now in a manner useless by reason of the frequent statutes for punishing mutiny and desertion by the martial law, a method more concise and effectual, which

There are no other felonies newly enacted in the time of queen *Mary*, but those that were temporary, as 1 & 2 P. & M. cap. 3. telling false news, &c. after a former conviction (*) and 1 Mar. cap. 12. concerning riots.

C H A P. LXIV.

Concerning felonies newly enacted in the times of Queen Elizabeth, King James, King Charles I. and King Charles II.

IN the time of *Q. Elizabeth* there were several acts for making new felonies, and they be ranked into these ranks.

I. Such as were only temporary or during the queen's life; such were the statutes of 1 *Eliz.* cap. 16. which in some cases made rebellious assemblies felony. 14 *Eliz.* cap. 1. touching withholding the queen's castles and other matters. 23 *Eliz.* cap. 2. touching seditious books, letters, prophecies, calculation of the queen's nativity, &c.

II. Such as were perpetual, or otherwise continued, but afterwards repeal'd, as 1 *Eliz.* cap. 10. and 14 *Eliz.* cap. 4. touching exportation of leather, repeal'd by the statute of 18 *Eliz.* cap. 9. 5 *Eliz.* cap. 16. concerning witchcraft, repeal'd by 1 *Jac.* 1. cap. 12.

§ L

III. Such

which, however necessary it may be in the time of war, is by many thought not so suitable to *English* freedom in times of peace and tranquillity. See the statutes 1 *W. & M. Seff.* 1. cap. 5. and 6 *Geo.* 2. cap. 3. between which years they have been often renew'd, it not having been

judged proper to make them of long continuance, but rather to renew them from year to year.

(*) This offense was not made felony, but was punishable by imprisonment for life, and forfeiture of goods and chattels.

III. Such as were perpetual and stand unrepealed, or were temporary at first, and made perpetual, and of these I shall here give a brief account.

By the statute of 5 *Eliz. cap. 14.* It is enacted, “ That
 “ if any person or persons upon his or their own head or
 “ imagination, or by false conspiracy or fraud with others
 “ shall wittingly, subtilly and falsly forge or make, or subtilly
 “ cause, or wittingly assent to be forged or made any false
 “ deed, charter, or writing sealed, court-roll, or the will of
 “ any person in writing, to the intent, that the state of free-
 “ hold or inheritance of any person or persons of in or to
 “ any lands, tenements or hereditaments freehold or copyhold,
 “ or the right, title, or interest of any person or persons in
 “ or to the same or any of them shall or may be molested,
 “ troubled, defeated, recoverd or charged, or shall pronounce,
 “ publish, or shew forth in evidence any such false or forged
 “ deed, charter, writing, court-roll or will as true, know-
 “ ing the same to be false and forged, as is aforesaid, to the
 “ intent above rememberd, and shall thereof be convicted
 “ either by action or actions of *forger of false deeds* to be
 “ founded upon this statute, or otherwise according to the
 “ order and course of the common law, &c. shall pay the
 “ party grieved his double costs and damages, be set upon
 “ the pillory, both his ears cut off, and also his nostrils slit
 “ and seard with an hot iron, be imprisond during life, and
 “ forfeit the profits of his lands during life (a).

“ Or if any person, as before, shall forge or assent to be
 “ forged, &c. any charter, deed, or writing, to the intent,
 “ that any person may have a term of years in any lands,
 “ not copyhold, or any annuity for life, years, or in tail, or
 “ fee-simple, or shall forge any obligation, bill obligatory,
 “ acquittance, release, or discharge of any debt, account, suit,
 “ demand, or other thing personal, or shall pronounce, &c.
 “ *ut supra*, that then he shall pay the party grieved double
 “ costs and damages, be set upon the pillory, and lose one of
 “ his ears, &c.

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“ And

(a) Upon this clause of the statute *Ja-phet Croke*, alias *Sir Peter Stranger*, was convicted, *Pasc. 4 Geo. 2. B. R.* and sufferd the penalties of the act.

“ And if any person or persons, being hereafter convicted
“ of any of the offenses aforesaid by any of the ways above
“ limited, shall after his or their conviction or condemna-
“ tion estfoons commit or perpetrate any of the offenses afore-
“ said, that then every such second offense shall be adjudged
“ felony ; and the parties convicted or attainit thereof accord-
“ ing to law shall suffer death, and forfeit their goods and
“ lands, as in case of felony, without having advantage of
“ sanctuary or clergy ; but the wife not to lose her dower,
“ nor blood to be corrupted, nor heirs disherited.

“ Justices of *oyer* and *terminer* and of assize to hear and de-
“ termine the offenses against this act.

“ Not to extend to any attorney or lawyer pleading a
“ forged deed, not being party or privy to the forging, nor
“ to the exemplification of a forged deed, nor to any judge,
“ that shall cause the seal to be set to such exemplifica-
“ tion.

Upon this statute, so far as it relates to felony, these things
considerable shall be set down in order.

1. What is a making, forging, or assenting.

If *A.* make a deed of feofment to *B.* and after make a
deed of feofment to *C.* with an ante-date before the other
feofment, this was a forging within the statute of 1 *H.* 5.
cap. 3. and also within this statute. *Co. P. C. cap.* 75. 27
H. 6. 3. *a.*

But *note*, that it is not the bare ante-dating of a deed;
that makes a forgery, for then most assurances, especially bar-
gains and sales for recoveries, leases for years to enable a re-
lease would be forgeries ; but that, which makes it forgery in
the former case, is the intent to avoid his own feofment ;
and the words of this statute are, *to the intent that the estate
of another person should be disturbed* ; so the intent is to be
joind in case of forgery.

Again, if *A.* make a true deed of feofment to *B.* of the
manor of *Dale*, and after *B.* raise out *D.* and put in *S.* where-
by the feofment imports the manor of *Sale* ; or if *A.* grant a
rent-charge to *B.* for life, and after sealing and delivery *B.*
raise the deed, and enlarge the sum or estate, this is a subtle
making

making of a false deed within this statute; *vide* 1 *Andersf. Rep. Puckering's case, Case 151. p. 100.*

An assent after the fact committed makes not the party assenting guilty or principal in the forging, but it must be a precedent or concomitant assent.

2. What is a writing sealed, deed, will, or court-roll.

The forging of a false customary of a manor put under seal, whereby the interest of the lord is molested, is a writing under seal within this statute. *Dy. 322. b. Taverner's case.*

The inserting of a clause in a will purporting a devise of lands without warrant or direction of the devisor is the forging of a will within this statute, tho the whole will be not forged, and altho done in the testator's life by the clerk, that writes the will. *Co. P. C. cap. 75.* against the report of *Dy. 288. a. Marvin's case.*

But *note*, this was when the testator was speechless, but if he had his understanding, and assented to it or published it afterwards, it is no forgery, tho at first written without his direction.

Forging surrenders, admittances, court-rolls of copyhold lands are within this statute.

If the deed or will forged purport only a lease for years, whereby the freehold is charged, or of a rent-charge for years, it is within this first branch.

A. makes a lease for years to *B.* a forging of an assignment of that lease from *B.* to *C.* is a forging of a deed within the second clause, *Co. P. C. ubi supra*, against the opinion in *Noy's Rep.* in *Markam's case (b).*

But an assignment made here of a term for years of land in *Ireland* is said not to be within this statute, but punishable as a misdemeanor at common law. 29 *Eliz. Newman's case, Hughes 3 Part, N. 221.*

3. What is a pronouncing or publishing, knowing the same to be forged:

If *A.* forge a deed, and *B.* tell *C.* that the deed is forged, and yet *C.* publisheth it, it was resolved to be within the statute in *Gresham's* case. *P. 38 Eliz. Cam. Stellata (c).*

But it seems to me, tho such a relation may be an evidence of fact to prove his knowledge, yet it is not conclusive, tho perchance *de facto* the deed be forged; for possibly there might be circumstances of fact, that might make the person relating it or his relation not credible, so that the *knowing* must upon the whole matter be left to the jury upon the circumstances of the case, and therefore the case of *Gresham* being in the star-chamber, where the lords are judges of the fact upon the evidence, is no authority in this case.

4. What is a writing, bill, bond, acquittance.

A will in writing concerning goods only is within this clause (*d*).

The forging of a statute staple, or recognizance in nature of a statute staple, is within this statute, because the party's hand and seal are to it, but not the forgery of a statute merchant or recognizance, because they have not the conusor's seal. *Co. P. C. p. 171. 15 H. 7. 16. a. (e).*

A. writes and seals a letter to *B.* and subscribes it, *B.* cuts off the lower part of the letter with the hand of *A.* and puts to it the seal of his letter, and over it writes an acquittance, this is the forging an acquittance. *Co. P. C. ubi supra.*

I come to the point of felony, having before stated what is a first offense within this statute.

There must be a conviction of a first offense before the second offense be committed, otherwise the second offense is not felony; and therefore if before conviction of forgery *A.*

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commit

(*c*) This is the same with *Markham's* case, and is cited by lord *Coke* for this purpose. *Co. P. C. p. 170. in margine.*

(*d*) This seems to be grounded on a mistake of lord *Coke*, who in his comment on this statute supposes the word *writing* to be inserted in the latter part of this clause, after the words *any obligation or bill obligatory*, whereas it is not so, for the statute makes no mention of *writings* but only with respect to an interest in lands or annuities, and consequently does not extend to a will of goods on-

ly, and so was the case cited by lord *Coke* in *Dyer* 302. *b.* which was of a will of a lease for years, and not of personal goods only; but this case is expressly included in a later statute, *viz. 2 Geo. 2. cap. 25.* which makes such a forgery felony without benefit of clergy.

(*e*) According to this case it should be quite the reverse, for it is there said, that the statute *merchant* has the seal of the party, which, the book says, is not requisite in a statute *staple*.

commit a first and a second offense, this second offense is not felony within this statute.

And by conviction, I conceive, is intended not barely a conviction by verdict, where no judgment is given, but it must be a conviction by judgment.

And the indictment for a second offense must recite the record of the first conviction, that it may appear to be a conviction of such a forgery as is within the statute; for if it be not, the indictment of felony for the second offense fails.

And upon the evidence, tho the record of the first conviction ought to be proved, yet the matter of the first conviction shall never be re-examined, but must stand for granted, and the party is concluded touching the truth of the matter of the first conviction by the record of that conviction.

If *A.* publish a false deed knowingly, and be convicted upon this statute for this offense, and after such conviction forge a deed, this is a second offense, and felony within this statute, tho the publishing be prohibited by one clause, and the forging by another, adjudged *P. 7 Jac. B. R. Booth's case (f)*, *Co. P. C. p. 172.* for the words are, *if he commit any of the said offenses the second time*: And so, if he be convicted of forgery, the publication of a forged deed afterwards knowingly is felony, or if he be first convicted of the forgery of a court-roll, and after that forge an obligation or acquittance; for the second offense in any of the forgeries or publications is felony, tho it be of a different kind, if the first or second offense be within the statute (*g*).

The hearing and determining of the offense against this statute are limited to the justices of assize, or *oyer and terminer*.

This extends not to the justices of peace, for tho in the commission of the peace there is a clause, *nec non ad audiendum*

2

(*f*) 13 *Co. Rep.* 34.

(*g*) But by 2 *Geo. 2. cap. 25.* the first offense is made felony without benefit of clergy, and extends to all deeds, wills, bonds, writings obligatory, bills of exchange, promissory notes, indorsements or assignments of bills of exchange or pro-

missory notes, or acquittances or receipts for money or goods, if done with an intention to defraud any person; this act was made to continue for five years, and to the end of the next sessions of parliament, and so expired the 15th of *May* 1735.

dum & *terminandum*, yet they being commissions of a several nature, they are not comprised under the name of justices of *oyer* and *terminer* (*b*).

But the court of king's bench may hear and determine these offenses, for they are justices of *oyer* and *terminer* and more. *Co. P. C. cap. 41. p. 103.*

The offenders as to felony in this statute are excluded from clergy and sanctuary.

The statute of 5 *Eliz. cap. 20.* concerning *Egyptians*. *Vide quæ supra super stat. 1 & 2 P. & M.*

By the statute of 8 *Eliz. cap. 3.* “ No man shall bring, “ deliver, send, receive, or take, or procure to be brought, “ deliverd, sent, received, or taken into any ship or bottom “ any manner of sheep alive, to be carried or conveyd out “ of this realm, or out of *Wales*, or out of *Ireland* or any of “ the queen's dominions upon pain of forfeiture of all his “ goods, the moiety to the queen, the other moiety to the “ informer, imprisonment, and loss of his left hand; and “ the second offense to be felony.

“ But no corruption of blood or loss of dower.

Justices of *oyer* and *terminer*, gaol-delivery or of the peace, have power to hear and determine offenses.

The offender hath benefit of clergy as well in case of felony, as of cutting of the hand. *Co. P. C. cap. 42.*

The statute of 14 *Eliz. cap. 5.* concerning rogues and vagabonds is repealed by the statute of 35 *Eliz. cap. 7.* and settled in another way by 39 *Eliz. cap. 4.* and therefore I shall refer it thither.

By the statute of 27 *Eliz. cap. 2.* “ It shall not be lawful “ for any jesuit, seminary priest, or other such priest, deacon, or other religious or ecclesiastical person whatsoever, “ born within this realm or any of the queen's dominions, “ hereafter to be made, ordaind or professed by any authority or jurisdiction, derived, challenged, or pretended from “ the see of *Rome*, to come into this realm or any of the “ queen's dominions, (except as in that act is excepted,) under pain of high treason.

“ And

(*b*) *Cro. Eliz.* 87.

“ And any person, that after the end of forty days shall
 “ wittingly and willingly relieve, comfort, aid, or maintain
 “ such jesuit, &c. being at liberty and out of hold, knowing
 “ him to be a jesuit, seminary priest, &c. shall be adjudged
 “ a felon without benefit of clergy.

By the statute of 31 *Eliz. cap. 4.* “ If any having the
 “ charge or custody of any armour, ordinance, munition, pow-
 “ der, shot, or of habiliments of war of the queen, her heirs
 “ or successors, or of any victuals provided for the victual-
 “ ling of any soldiers, gunners, mariners, or pioners, shall for
 “ lucre, or gain, or wittingly, advisedly, and of purpose to
 “ hinder or impeach her majesty’s service embezzle, purloin
 “ or convey away the same to the value of twenty shillings
 “ at one or several times, it shall be felony.

“ The prosecution to be within a year after the offense:
 “ No corruption of blood, loss of dower, nor loss of lands but
 “ during the life of the offender.

“ The prisoner allowed to make any lawful proof for his dis-
 “ charge. Clergy not taken away.

By the statute of 35 *Eliz. cap. 1.* It is enacted, “ That
 “ if any person above the age of sixteen years, who shall
 “ obstinately refuse to repair to some church or chapel, or
 “ usual place of common prayer to hear divine service esta-
 “ blished by her majesty’s laws or statutes, and shall forbear
 “ to do the same by the space of a month next after with-
 “ out any lawful cause, shall at any time after forty days
 “ next after the end of this session of parliament, by print-
 “ ing, writing, words or speeches advisedly and purposely
 “ go about to persuade others to impugn her majesty’s power
 “ in causes ecclesiastical, or persuade others to forbear com-
 “ ing to church to hear divine service or receive the com-
 “ munion according to law, or to be present at any unlaw-
 “ ful conventicle or meeting, under pretense of exercise of
 “ religion contrary to her majesty’s laws, or shall after the forty
 “ days willingly join in or be present at such assemblies or
 “ meetings under colour of exercise of religion, contrary to
 “ the laws of this realm, then such person being thereof law-
 “ fully convicted shall be committed to prison, there to re-

“ main without bail or mainprife, till he fhall conform and
“ yield to come to fome church or chapel, and hear divine
“ fervice according to the queen’s laws, and make open fub-
“ miffion and declaration of his conformity, as by the
“ act is prefcribed.

“ And if fuch perfon fhall not within three months, be-
“ ing required by the bifhop of the diocefe or juftice of peace
“ of the county, where he is convicted, come to fome
“ parifh church to hear divine fervice, he fhall abjure the
“ realm, as by that act is appointed.

“ And if he fhall refufe to abjure, or having abjured fhall
“ not go, or elfe fhall return without the queen’s license, it is
“ felony without benefit of clergy.

“ No lofs of dower, corruption of blood, nor forfeiture of
“ lands longer than the life of the offender.

“ Special punifhment by forfeiture of 10 *l. per mensem*,
“ for fuch as relieve them, except father, mother, &c.

“ Not to extend to women or popifh recusants.

Tho it were formerly doubted, yet upon great confidera-
tion by all the judges it hath been refolved, that this fla-
tute is in force.

But to make up the offence to be felony there are fo many
circumftances required, that it is difficult to have any legal con-
viction according to this ftatute.

1. The party muft be above fixteen years old. 2. He muft
obftinately refufe to come to church, which obftinate refufal
cannot be without a request or monition to repair to church.
3. He muft forbear to come to church for a month after fuch
refufal without a reasonable caufe of abfence. 4. He muft
do fome of thofe acts limited by the ftatute, as to diffuade
coming to church, &c. or after that month’s abfence be at an
unlawful conventicle.

And all thefe things muft be precisely charged in the in-
dictment and proved upon evidence, or otherwife no fuch
commitment, or abjuration, or felony can follow.

And therefore, altho many have been haftily convicted up-
on this ftatute upon general indictments of not coming to
church, and being at an unlawful conventicle, yet never was

any convict before me upon this offense, because these circumstances were either not laid in the indictment, or not effectually proved.

Besides, it is difficult to say, what conventicle upon pretense of exercise of religion was in those times contrary to the laws of the realm, unless mass, or by mass-priests, tho of late time it hath been settled by special acts of this parliament, *viz.* (i).

The reason why popish recusants are exempted out of this act is, because there is provision touching them in the next following, *viz.*

By the statute of 35 *Eliz. cap. 2.* “ If any popish recusant
 “ not having an estate in lands of twenty marks *per annum*,
 “ or goods to the value of twenty marks, (other than *feme-*
 “ *coverts*) shall not repair to his dwelling-house, &c. accord-
 “ ing to the act, and present himself and his name to the
 “ minister and church-wardens of that parish; or after their
 “ coming shall go five miles from their dwelling, and being
 “ therefore taken shall not within three months after their
 “ taking come to church and make their confession of con-
 “ formity, as in that act is expressed, being thereunto required
 “ by a justice of peace, or by the minister or curate of the
 “ parish, then such recusant being thereunto required by two
 “ justices or coroner of the county shall abjure the realm
 “ for ever; and if he refuse to abjure, or having abjured re-
 “ fuse to go out of the realm, or being gone shall return
 “ without license, it shall be felony without clergy.

By the statute of 39 *Eliz. cap. 4.* All former statutes against rogues and vagabonds are repealed, and among other things it is enacted, “ That if any rogues shall appear dangerous, or
 “ will not be reformed from their roguish life by the provisions
 “ of that act, it shall be lawful for two justices of the limit,
 “ whereof one of the *Quorum*, to commit him to the house
 “ of correction till the next quarter-sessions, and then the
 “ major

(i) There is a blank here in the *MS.* but the acts here meant are 16 *Car. 2. cap. 4.* and 22 *Car. 2. cap. 1.* by which statutes every assembly for religious worship of five or more besides the family, in other manner than is allowed by the litur-

gy of the church of *England*, is declared to be a conventicle contrary to law; but these acts are now of no force against protestant dissenters by reason of the toleration act. 1 *W. & M. cap. 18.*

“ major part of the justices may banish him out of the realm
“ and dominions thereof to such place, as shall be assignd
“ by six of the privy council, whereof the lord chancellor
“ or treasurer to be one, or condemn him to the gallies of
“ this realm; and if any such rogue so banished shall return
“ again without lawful warrant, it shall be felony to be
“ heard and determind in that county of *England* or *Wales*,
“ where he shall be apprehended.

“ But in this case the offender hath clergy.

This act is continued by the statute of 1 *Jac. cap. 25.*
3 *Car. 1. cap. 4.* and 16 *Car. 1. cap. 4.*

By the statute of 1 *Jac. cap. 7.* It is farther added, “ That
“ such dangerous and incorrigible rogues shall by judgment
“ of the same justices in the sessions be branded in the shoul-
“ der with the letter *R.* and be sent to the place of his last
“ dwelling; and if it cannot be known, then to the place of
“ his birth; and if such rogue be after found offending in beg-
“ ging or wandering contrary to this statute, it shall be fe-
“ lony without clergy, and tried in the county, where he
“ shall be taken.

This act is likewise continued by 3 *Car. 1.* and 16 *Car. 1.*
cap. 4.

This act doth not take away the punishment by the sta-
tute of 39 *Eliz. cap. 4.* but gives election to the justices in
the sessions to inflict either.

By the statute of 39 *Eliz. cap. 17.* “ 1. Idle and wandering
“ soldiers or mariners, or idle persons wandering as soldiers
“ or mariners, 2. Idle or wandering soldiers coming from
“ sea not having a testimonial under the hand of a justice of
“ peace, setting down the time and place of his landing, place
“ of his dwelling and birth, and limiting a time for his pas-
“ sage thither, 3. Or exceeding the time limited by his
“ testimonial fourteen days, unless he fall sick, if he be in
“ truth a soldier or mariner, 4. Every wandering soldier or
“ mariner, or every person wandering as a soldier or ma-
“ riner counterfeiting his testimonial, or having the same
“ forged testimonial about him, knowing the same to be forged,
“ is a felon without benefit of clergy.

This

This offense may be heard and determined before justices of assize, gaol-delivery, or of the peace, having power to hear and determine felony. No corruption of blood.

If a freeholder will take him into service for a year, and he become bound by recognizance, *ut per statute*, no farther proceeding to be against him, but if within the year he depart without license, it is felony without benefit of clergy.

Continued by 3 *Car.* 1. *cap.* 4. and 16 *Car.* 1. *cap.* 4.

And thus far for felonies enacted in the time of queen *Elizabeth*.

In the time of king *James* these ensuing felonies were *de novo* enacted.

By the statute of 1 *Jac.* *cap.* 11. “ If any person within
“ his majesty’s dominions of *England* and *Wales*, being married,
“ do at any time after marry any person or persons, the
“ former husband or wife being alive, every such offense
“ shall be felony, and the party offending shall receive such
“ proceeding, trial and execution in such county, where he
“ or she is taken.

This act hath five exceptions. 1. It shall not extend to such persons, whose husband or wife shall be continually remaining beyond the seas for the space of seven years together. 2. Or whose husband or wife shall absent him or herself in any place within the king’s dominions, the one not knowing the other to be living within that time. 3. Nor to any person divorced by any sentence had or to be had in the ecclesiastical court. 4. Nor to any person whose marriage hath been or shall be declared void by sentence in the ecclesiastical court. 5. Nor to any person or persons for or by reason of any marriage had or to be had within the age of consent.

This felony not to make corruption of blood, or loss of dower, or disinheritance of the heir.

1. Observables upon the body of the act.

Altho the second marriage be simply void, yet the parliament thought it just to make it felony.

A. takes *B.* to husband in *England*, and after takes *C.* to husband in *Ireland*, she is not indictable in *England*, because the offense was committed out of this kingdom. But if *A.*

marry a husband in *Ireland*, and come into *England* and marry a second husband here, it is felony. The former case was accordingly ruled at *Newgate* sessions (k).

A. takes B. to husband in *Holland*, and then in *Holland* takes C. to husband, living B. and then B. dies, and living C. she marries D. this is not marrying a second husband the former being alive, for the marriage to C. living B. was simply void, and so he was not her husband, but if B. had been living, this had been felony to marry D. in *England*: Ruled at *Newgate* sessions about 1648. the lady *Madison's* case.

The first and true wife is not to be allowed as a witness against the husband, but I think it clear the second wife may be admitted to prove the second marriage, for she is not his wife, contrary to a sudden opinion delivered in *July* 1664. at the assizes in *Surrey* in *Arthur Armstrong's* case; for she is not so much as his wife *de facto*. *Vide quæ dixi supra super Statut. 3 H. 7. cap. 2. p. 661.*

2. Observables touching the exceptions.

As to the *first*, if the husband or wife be beyond the seas seven years, tho the party in *England* hath notice, that he or she is living, yet it is no felony, which appears by the second exception, where the party is commorant in the king's dominions, if the party hath notice, it is felony; notice there makes the offense, but not when the husband or wife is beyond sea; and yet in the former case as well as the latter the second marriage is void. *Vide 22 E. 4. Consultation 5.*

As to the *second* exception: suppose the first wife or husband be absent in *New-England* or *Ireland* seven years, this is beyond the seas, and so within the words of the first exception, and yet within the king's dominions, and so not aided by the words of the second exception, unless without notice; it seems *in favorem vitæ* the words *within the king's dominions* must be intended within *England, Wales* or *Scotland* to make both clauses consistent; but however the isle of *Wight* is not beyond the sea within the first clause, because *infra corpus comitatûs Southampton*: so for *Scilly, Lundy. Quære* of *Guernsey, Jersey*.

As to the *third* exception: certainly the divorce intended is not *à vinculo matrimonii*, for then without the aid of any proviso either may freely marry; but it must be intended of divorces *à mensâ & thoro*. P. 12 Car. 1. B. R. Porter's case, it was doubted, whether a divorce *causâ sevitæ* were such a divorce as was within this exception, because it seemed rather to be a provisional separation for the wife's safety and maintenance, than a divorce; but it was never resolved, Cro. Car. 461. (1).

If there be a divorce *à vinculo*, and one of the parties appeals, tho this suspend the sentence and possibly may repeal it, yet a marriage pending that appeal is held to be aided by this exception. Co. P. C. cap. 27. p. 89. But if the sentence of divorce be repealed, a marriage after is not aided by this exception, tho there was once a divorce.

As to the *fifth* exception: If either party be within the age of consent, the exception extends to both: A. of the age of twenty years marries B. of the age of nine years, A. marries a second wife, this is aided by the exception, as well as if B. had married a second husband before agreement at her age of consent to the first marriage, for either of them may *resilire* before they have both consented. T. 42 Eliz. B. R. Babington's case, Co. P. C. cap. 27. p. 89.

But if a woman of twelve years marry a man of fourteen years, a second marriage by either is felony, tho they are infants, because as to matters of this kind, especially the business of marriage, they are at this age adjudged of discretion. *Sed vide supra cap. 3. plenius de hac materiâ.*

3. Observables touching the trial.

The trial to be in the county, where the offender is apprehended, is added *cumulativè*; for he may be indicted, where the second marriage was, tho he be never apprehended, and so may proceed to outlawry, as likewise it may be done upon the statute of 7 H. 7. cap. 1. of soldiers. Co. P. C. cap. 26. p. 87.

By the statute of 1 Jac. cap. 12. All former acts against conjuration, inchantments, &c. are repealed, and it is enacted,

3

“ 1. That

(1) Kel. 27.

“ 1. That if any person shall use, practise, or exercise any invocation or conjuration of any evil or wicked spirit,

“ 2. Or shall consult, covenant with, entertain, employ, feed, or reward any wicked or evil spirit to or for any intent or purpose,

“ 3. Or take up any dead man, woman, or child out of his or their grave, or any other place, or the skin, bone, or any other part of any dead person to be employ'd in any manner of witchcraft, forcery, charm, or enchantment,

“ 4. Or shall use, practise, or exercise any witchcraft, forcery, charm, or enchantment, whereby any person shall be kild, destroyd, wasted, consumed, pined, or lamed in his or her body or any part thereof,

“ Every such person or persons, their aiders, abettors and counsellors being thereof convict and attaint shall suffer death as a felon without clergy.

“ 1. If any person shall take upon him by witchcraft, enchantment, charm, or forcery to tell, where any treasure of gold or silver may be found in the earth or other secret places.

“ 2. Or where goods or things lost or stolen should be found or be come at.

“ 3. Or shall use any forcery to the intent to provoke any person to unlawful love.

“ 4. Or whereby any cattle or goods of any person shall be destroyd, wasted, or impaired.

“ 5. Or to hurt or destroy any person in his or her body, tho the same be not effected or done.

“ First conviction one year's imprisonment without bail, and once a quarter to stand two hours in the pillory, and confess his or her fault.

“ If after conviction he commit the like offense, and be convicted and attaint of such second offense, he shall suffer death as a felon without clergy; but no loss of dower, corruption of blood, nor heir disinherited.

By the statute of 1 *Fac. cap.* 31. persons going abroad with a plague-fore, felony. But this act is discontinued, as my lord

Coke saith, *Co. P. C.* p. 90. but 3 *Car. 1. cap. 4.* hath revived or continued it to the end of the first session of the next parliament; and by 16 *Car. 1. cap. 4.* it is continued till repealed.

But it gives no forfeiture of lands, goods, or chattels.

By the statute of 3 *Jac. cap. 4.* “If any subject pass out of this realm to the intent to serve any foreign prince, state, or potentate, or shall pass over the seas, and there shall voluntarily serve any such foreign prince, &c. not having before his or their passing taken the oath prescribed in that act before the customer, comptroller of the port, haven or creek, or their deputy or deputies, or being a gentleman, or of higher rank, or hath born office of a captain, lieutenant, or other place in the camp shall pass, &c. before he hath taken the oath and given bond, &c. it is felony.

“The trial shall be in the county, where the offense is committed, *viz.* the place of his departure, tho that be but part of the offense, and there they shall enquire of the rest of the offense committed beyond sea, *viz.* his service there (*m*).

“The offender hath his clergy.

“No corruption of blood nor loss of dower.

By the statute of 21 *Jac. cap. 26.* “All persons, who acknowledge or procure to be acknowledged any fine or fines, recovery or recoveries, deed or deeds enrolled, statutes or recognizances, bail or judgment in the name of any person or persons not privy or consenting to the same, and being thereof lawfully convicted or attaint shall incur the penalties of felons without benefit of clergy.

“No corruption of blood nor loss of dower.

A bail taken before a judge is not a bail within this statute till it be filed of record, and if it be not filed, the acknowledging thereof in another's name makes not felony, but a misdemeanor only. (*)

The statute of 21 *Jac. cap. 27.* for murdering bastard children: This I shall reserve to the title of evidence, *Part II. cap. 39. quod vide ibidem.*

(*m*) *Co. P. C.* p. 80. *cap. 4.*

(*) But this is since made felony by 4 & 5 *W. & M.*

And thus far of felonies in the time of king *James*.

In the time of king *Charles I.* I find not any new enacted felony.

I therefore comè to the time of king *Charles II.* (*)

(*) Here the manuscript breaks off, our author having proceeded no farther, but to render the work more complete, it is thought proper to subjoin an account of the several felonies, which have

been enacted since that time, by which it will appear, that later times have been no less fruitful in multiplying capital punishments, than former ones were.

Felonies enacted in the time of king Charles II.

I. Transporting wool.

BY 13 & 14 *Car. 2. cap. 18.* it is made felony to transport wool out of *England, Wales or Ireland*; but by 7 & 8 *W. 3. cap. 28.* the making it felony is repeal'd, and it is reduced to a misdemeanor, which by that and later statutes is subjected to severe penalties.

II. *Coventry's* act concerning dismembering or disfiguring.

By 22 & 23 *Car. 2. cap. 1.* If any shall of malice forethought, and by lying in wait unlawfully cut out or disable the tongue,

Put out an eye,

Slit the nose,

Cut off a nose or lip,

Or cut off or disable any limb or member of any other person with intention to maim or disfigure, they, their counsellors, aiders, and abettors shall be guilty of felony without benefit of clergy.

Attainder on this statute shall not work any corruption of blood or forfeiture.

Sir *John Coventry* a member of the

house of commons had a little before been assaulted in the street, and his nose slit, which gave occasion to the making this act, which from him was called *Coventry's* act.

Upon this statute *Coke* and *Woodburne* were condemned and executed at *Suffolk* assizes 8 *Geo. 1.* for slitting the nose of *Mr. Crispe.* See *State Tr. Vol. VI. p. 212.*

III. Maliciously burning stacks of corn, or killing cattle in the night.

By 22 & 23 *Car. 2. cap. 7.* Whoever shall in the night-time maliciously, unlawfully, and willingly burn any stacks of corn, hay, or grain, barns or other houses, or buildings, or kilns,

Or shall in the night-time maliciously, unlawfully, and willingly kill or destroy horses, sheep, or other cattle, shall be guilty of felony; but liberty is given the offender to chuse transportation for seven years.

Attainder on this act shall not work corruption of blood, loss of dower, or disherison of the heir.

During the short reign of king James II. I do not find any new enacted felony.

Felonies enacted in the time of king William III.

I. Personating bail.

BY 4 *W. & M. cap. 4.* Personating another before those, who have authority by that act to take bail, so as to

make him liable to the payment of any sum of money in that suit or action, is made felony.

II. Counterfeiting lottery tickets.

By 5 & 6 *W. & M. cap. 7.* 8 *Ann. cap. 4.* 12 *Ann. sess. 1. cap. 2. sess. 2. cap. 9.* 5 *Geo. 1. cap. 3 & 9.* 7 *Geo. 1. cap. 20.* The forging or counterfeiting the tickets in the several lotteries appointed by the said acts,

Or standing orders or receipts given out in pursuance of the said acts,

Or altering the number or principal sum thereof,

Or counterfeiting the hand of any person to such order,

Or the bringing any such forged ticket, &c. (knowing it to be so) to the managers, &c. with intent to defraud his majesty or any contributor, is made felony without benefit of clergy.

III. Counterfeiting the stamps.

By 5 & 6 *W. & M. cap. 21.* 9 & 10 *W. cap. 25.* 8 *Ann. cap. 9.* 9 *Ann. cap. 11 & cap. 23.* 10 *Ann. cap. 19.* 12 *Ann. sess. 2. cap. 9.* 5 *Geo. 1. cap. 2.* Forging any of the stamps appointed by the said acts,

Or counterfeiting or resembling the impression of the same upon any vellum, parchment, or paper,

Or uttering, vending, or selling any vellum, &c. with such counterfeit impression, knowing the same to be so,

Or using any stamps or marks with intent to defraud the crown of the stamp-duty, is made felony without benefit of clergy.

IV. Counterfeiting the seal of the Bank, bank-notes, &c.

By 7 & 8 *W. cap. 31. §. 36.* 8 & 9 *W. cap. 19. §. 36.* and 11 *Geo. 1. cap. 9.* The forging the common seal of the bank,

Or any bank-bill or bank-note,

Or erasing or altering any such bill or note,

Or altering or erasing any indorsement on any bank-bill or note,

Or tendering the same in payment, knowing the same to be forged, erased, or altered, is made felony.

V. Counterfeiting exchequer-bills.

By 7 & 8 *W. cap. 31. §. 78.* 9 *W. cap. 2. §. 3.* 5 *Ann. cap. 13.* 7 *Ann. cap. 7.* 9 *Ann. cap. 7.* 11 *Geo. 1. cap. 17. §. 12.* The counterfeiting exchequer-bills,

Or any indorsement thereon,

Or tendering such counterfeit bills or indorsement, knowing the same to be counterfeit, with intention to defraud his majesty or any other person, is felony without benefit of clergy.

VI. Blanching copper, &c.

By 8 & 9 *W. cap. 25.* Blanching copper for sale, or mixing blanching copper with silver,

Or knowingly buying or selling, or offering to sale such, or any other malleable mixture of metals or minerals heavier than silver, and wearing like gold,

Or receiving, paying, or putting off any counterfeit, or unlawfully diminished milled money (not cut in pieces) at a lower rate than it imports, or was coined or counterfeited for, is made felony.

Felonies enacted in the time of queen Anne.

I. Wilfully destroying any ship.

BY 1 *Ann. sess. 2. cap. 9.* and 4 *Geo. 1. cap. 12.* it is felony for any captain, master, mariner, or other officer belonging to any ship wilfully to cast away, burn, or destroy the said ship, or procure the same to be done to the prejudice of the owner,

Or for the owner, captain, &c. to do the like, to the prejudice of any under-

writer of the policy of insurance, or of any merchant, who shall load goods therein.

II. Receiving stolen goods.

By 5 *Ann. cap. 31.* Receivers of stolen goods, knowing them to be stolen, are declared guilty of felony, as accessories.

III. Af-

III. Assaulting a privy counsellor in the execution of his office.

By 9 *Ann. cap.* 16. It is felony without benefit of clergy to assault, wound, or attempt to kill a privy counsellor in the execution of his office.

The occasion of making this act see *supra p.* 230. *in notis.*

IV. Counterfeiting the seal of the *South-Sea* company, *South-Sea* bonds, &c.

By 9 *Ann. cap.* 21. It is felony without benefit of clergy to forge or counterfeit the common seal of the *South-Sea* company,

Or to forge, counterfeit, or alter any of their bonds,

Or knowingly to tender, or offer to dispose of the same, with intent to defraud any person, see 6 *Geo. 1. cap.* 11.

V. Making an hole in a ship, or stealing any pump from a ship.

By 12 *Ann. cap.* 18. made perpetual by 4 *Geo. 1. cap.* 12. The making any hole in a ship in distress,

Or stealing any pump belonging to such ship, or aiding or abetting thereto,

Or wilfully doing any thing tending to the immediate loss of such ship, is made felony without benefit of clergy.

Felonies enacted in the time of king George I.

I. Concerning riotous assemblies.

BY 1 *Geo. 1. cap.* 5. (which is for the most part copied from an expired act of 1 *Mar. cap.* 12.) if twelve persons or more, being unlawfully and riotously assembled, shall so continue together to the number of twelve for the space of one hour after proclamation made to depart, such continuance is made felony without benefit of clergy;

As also to oppose or hinder the reading the proclamation,

Or to continue to the number of twelve for one hour after such hindrance so made, having knowledge thereof.

By the same act it is felony without benefit of clergy for any persons, unlawfully and riotously assembled, with force to pull down, or begin to pull down any church, or chapel, or building for religious worship allowed by the toleration act, or any dwelling-house, barn, stable, or other out-house.

II. Maliciously burning any wood or coppice.

By 1 *Geo. 1. cap.* 48. and 6 *Geo. 1. cap.* 16. It is felony for any person maliciously to set on fire or burn any wood, underwood, or coppice, or any part thereof.

III. Returning from transportation, taking a reward for helping to stolen goods, &c.

By 4 *Geo. 1. cap.* 11. If any offender ordered for transportation beyond sea shall return to, or (by 6 *Geo. 1. cap.* 23.) be found at large in *Great Britain* or *Ireland*, without some lawful cause before the expiration of his term, without licence from his majesty, he shall be guilty of felony without benefit of clergy.

By the same statute, whoever shall take any money or reward under pretense of helping any person to stolen goods, unless he apprehend the felon, and give evidence against him at his trial, shall be guilty of felony, and shall suffer in the same manner, as if he had stolen them himself with such circumstances, as the same were stolen.

Upon this clause *Jonathan Wild* was executed, 10 *Geo. 1.*

IV. Counterfeiting army debentures.

By 5 *Geo. 1. cap.* 14. 6 *Geo. 1. cap.* 17. 9 *Geo. 1. cap.* 5. It is felony without benefit of clergy for any person to alter or counterfeit any army debentures,

Or fraudulently to issue out any other than for the sums certified by the commissioners.

V. Coun-

V. Counterfeiting *South-Sea* receipts or warrants, &c.

By 6 *Geo. 1. cap. 11.* It is made felony without benefit of clergy for any one to alter, forge, or counterfeit any *South-Sea* receipt for a subscription to the stock,

Or warrant for a dividend,

Or any indorsement or writing thereon,

Or knowingly to tender or offer to dispose of the same with intent to defraud any one.

VI. Counterfeiting the seal of the two assurance companies.

By 6 *Geo. 1. cap. 18.* The counterfeiting the corporation seal of either of the assurance companies, now known by the names of the *Royal Exchange* and the *London Assurance*,

Or altering any policy, bill, bond, or other obligation under their common seal,

Or knowingly paying away such policy, &c. or demanding the money thereon, is felony without benefit of clergy.

VII. Maliciously spoiling the garments of any persons in the streets.

By 6 *Geo. 1. cap. 23.* The wilful and malicious tearing, spoiling, cutting, burning, or defacing the garments or clothes of any person in the streets or highways is felony.

VIII. Smugling.

By 8 *Geo. 1. cap. 18.* If any persons above the number of five carrying offensive arms, or being in disguise, shall be found passing with foreign goods from any ship without due entry and payment of the duties,

Or shall forcibly resist any officer of the customs or excise in the seizing run goods, they shall be guilty of felony.

IX. Counterfeiting the name of or personating a proprietor for transferring stock, or receiving dividends.

By 8 *Geo. 1. cap. 22.* To counterfeit the name of any proprietor,

To forge or procure to be forged, or wilfully to act and assist in forging a let-

ter of attorney, or other instrument to transfer any share in the capital stock of any corporation established by act of parliament,

Or to receive any annuity, or dividend attending such share,

Or falsely to personate any proprietor for the purposes aforesaid, is felony without benefit of clergy.

X. The like as to annuity orders.

By 9 *Geo. 1. cap. 12.* To do the like with relation to any annuity order, is made felony without benefit of clergy.

XI. The *Waltham-black* act against appearing in disguise in any forest, &c. unlawfully hunting deer, robbing any warren, destroying fish, maiming cattle, destroying trees in any avenue, &c. firing houses, stacks of corn, &c. maliciously shooting at any person, sending threatening letters, &c.

By 9 *Geo. 1. cap. 22.* continued by 12 *Geo. 1. cap. 30.* and 6 *Geo. 2. cap. 37.* till *Sept. 1. 1736.* and from thence to the end of the next session of parliament, it is made felony without benefit of clergy for any person armed with offensive weapons, and having his face blacked, or otherwise disguised, to appear in any forest, chase, park, &c. or in any high road, open heath, common, or down,

Or unlawfully and wilfully to hunt, wound, kill, or steal any red or fallow deer,

Or unlawfully to rob any warren, &c.

Or to steal any fish out of any river or pond,

Or unlawfully to break down the head or mound of any fish-pond, whereby the fish shall be lost or destroyed,

Or unlawfully and maliciously to kill, maim, or wound any cattle,

Or to cut down, or otherwise destroy any trees planted in any avenue, or growing in any garden, orchard or plantation for ornament, shelter or profit,

Or to set fire to any house, barn, or out-house, hovel, cock, mow, or stack of corn, straw, hay, or wood,

Or maliciously to shoot at any person in any dwelling house or other place.

(Upon this clause Edward Arnold was convicted at Surrey Lent-assizes 1723-4- for shooting at lord Onslow.)

Or

Or knowingly to send any letter without any name, or signed with a fictitious name, demanding money, venison, or other valuable thing,

Or forceably to rescue any person being lawfully in custody for any of the offenses before-mentiond,

Or to procure any person by gift or promise of money, or other reward, to join in any such unlawful act.

No attainder on this act shall work corruption of blood, loss of dower or forfeiture.

This act was occasioned by the devastations and injuries then lately committed in a violent manner by several persons near *Waltham*, who had appeared blacked and disguised in the chafes, forests, &c. and was from thence called the *Waltham-black act*.

XII. Concerning the pretended privilege of the *Mint* in *South-wark*.

By 9 *Geo. 1. cap. 28*. If any person shall within the place commonly called the *Mint*, or the pretended limits thereof, wilfully obstruct any person serving or endeavouring to serve or execute any writ, warrant, or legal process, &c.

Or shall assault or abuse any person for having so done, whereby he shall receive any damage or bodily hurt;

Or shall oppose any officer of justice, or person aiding such officer in the execution of any writ, warrant or process, &c. or shall be abetting thereto;

Or shall rescue, or knowingly harbour or conceal any prisoner taken upon such process;

Or shall presume to exercise any unlawful jurisdiction for supporting the pretended privilege within the said place, such offender shall be adjudged guilty of felony, and be transported for seven years.

And if any person wearing any vizard, &c. or having his face or body disguised shall join or abet any riot, or oppose the execution of any legal process, &c. within the limits aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

And every person aiding or abetting, concealing or harbouring such disguised person, shall be adjudged guilty of felony, and be transported.

XIII. The like with respect to *Wapping*, *Stepney*, &c.

By 11 *Geo. 1. cap. 22*: The same provision is made against most of the said offenses, if committed within the hamlet of *Wapping*, *Stepney*, or any other place within the bills of mortality, whereof presentment shall have been made by the grand jury at a general or quarter-sessions.

XIV. Counterfeiting *East-India* bonds, or indorsements thereon, or on *South-Sea* bonds, &c.

12 *Geo. 1. cap. 32*. Whoever shall forge or counterfeit, or wilfully assist in forging or counterfeiting the name or hand of the accountant general, the court of chancery, the register, clerk of the report-office, or any of the cashiers of the bank of *England*, to any certificate, report, &c.

Or any *East-India* bond or indorsement thereon,

Or any indorsement on any *South-Sea* bond, shall be adjudged guilty of felony without benefit of clergy.

XV. Assaulting any master woolcomber, weaver, maliciously breaking tools, &c.

By 12 *Geo. 1. cap. 34*. If any person shall assault any master woolcomber, or master weaver, or other person concerned in the woollen manufacture, whereby he shall receive any bodily hurt for not complying with any such illegal by-laws, &c. as in the act mentiond,

Or shall write or send any threatening letter to such person for not complying with such illegal by laws, or with any demands or pretences of his workmen, or others employed by him in the woollen manufacture, he shall be deemed guilty of felony, and be transported for seven years.

If any person shall maliciously cut or destroy any woollen goods in the loom or on the rack;

Or shall destroy any rack on which such goods are hanged in order to dry;

Or shall wilfully break any tools used in the making such woollen goods not having the consent of the owner so to do;

Or shall break or enter by force into any house or shop by night or by day for any of the purposes aforesaid, such offender shall be adjudged guilty of felony without benefit of clergy.

Felonies enacted in the time of king George II.

I. Maliciously breaking down turn-pikes.

BY 1 *Geo. 2. cap. 19.* 5 *Geo. 2. cap. 33.* 8 *Geo. 2. cap. 20.* It is made felony without benefit of clergy for any person maliciously to break down or destroy any turnpike-gate or other fence belonging to such turnpike erected to prevent passengers from passing by without paying the toll, or forceably to rescue any person lawfully in custody for such offense.

Attainder by this act not to work corruption of blood, loss of dower or forfeiture.

II. Forging of deeds, stealing bonds, &c.

By 2 *Geo. 2. cap. 25.* The forging or counterfeiting, or procuring to be forged or counterfeited any deed, will, bond, writing obligatory, bill of exchange, promisory note for payment of money, the indorsement or assignment of any bill of exchange, or promisory note for payment of money, or any acquittance or receipt for money or goods, or knowingly to utter or publish as true any forged deed, &c. with intention to defraud any person, is felony without benefit of clergy.

By the same statute to steal or take by robbery any bonds, notes, orders, tallies, &c. is felony of the same nature, and in the same degree, as if the money secured by such bonds, &c. and remaining unsatisfied, had been stolen or taken by robbery.

This act was made to continue only for five years from 29 *June 1729.* and from thence to the end of the then next sessions of parliament.

III. Stealing lead, iron, &c. fixt to any house or building.

By 4 *Geo. 2. cap. 32.* To steal, rip, cut, or break with intent to steal any lead, iron bar, iron gate, iron palifado, or iron rail fixed to any dwelling-house or other building used with such dwelling-house, or fixed in any garden, orchard, court-yard, fence or outlet belonging to any dwelling-house or other building is felony, and so it is in the aiders and abettors, and such as shall buy or receive such lead or iron, knowing the same to be stolen.

IV. Assaulting with an intent to rob.

By 7 *Geo. 2. cap. 21.* It is made felony with any offensive weapon or instrument unlawfully and maliciously to assault, or by menaces, or by any forceable or violent manner to demand any money, goods or chattels of any person, with a felonious intent to commit robbery on such person.

V. Counterfeiting the acceptance of a bill of exchange, or any accountable receipt.

By 7 *Geo. 2. cap. 22.* If any person shall falsely make, alter, forge, or counterfeit, or cause or procure to be counterfeited, &c. any acceptance of any bill of exchange, or the number, or principal sum of any accountable receipt for any note, bill, or other security for payment of money, or any warrant or order for payment of money, or delivery of goods, with intent to defraud any person, or shall with such intent knowingly utter or publish the same as true, he shall be deemed guilty of felony.

C H A P. LXV.

Certain general observations concerning felonies by act of parliament.

1. **G**ENERALLY if an act of parliament be, that if a man commit such an act he shall have judgment of life and member, this makes the offense felony, and this was ordinarily the clause used in antient statutes, as *Westm. 2. cap. 34. (a)*, *14 E. 3. cap. 10.* *28 E. 3. cap. 3.* *13 R. 2. cap. 3.* *&c. Co. P. C. cap. 29. p. 91.*

2. And consequently there ensued thereupon corruption of blood, eschete to the lord, and the wife's loss of dower.

3. But yet there may be and frequently are in acts of parliament, making new felonies, provisions, that there shall be no corruption of blood, disherison of the heir, or loss of dower, and this is done sometimes by enacting words, as in *1 Jac. cap. 31.* for going abroad with a plague-sore, sometimes by a proviso, that it shall not extend to corruption of blood, loss of dower, *&c.* as *8 Eliz. cap. 3.* *5 Eliz. cap. 14.* and sometimes by the words *saving to the wife her dower, and to the heir his inheritance*, as upon the statute of *1 Jac. cap. 12.* for witchcraft.

4. But notwithstanding such a clause the king shall have the forfeiture of his lands during his life, and also his goods, for no eschete can come to the lord, where the inheritance is saved to the heir.

5. But by a special clause forfeiture of goods as well as of lands may be provided against, as in the act of *1 Jac. cap. 31.* of going out with a plague-sore. *Co. P. C. cap. 6. p. 47.* and *cap. 28. p. 90.*

6. A sa-

(a) See 2 *Co. Instit. p. 434.*

6. A saving or exclusion of corruption of blood doth virtually make the heir inheritable, and saves also the woman's dower. *Co. P. C. cap. 28. super statut. 1 Jac. cap. 31.*

7. By an act making a new felony clergy is not excluded from the offender without special words. *Co. P. C. cap. 19. p. 73. super statut. 8 H. 6. cap. 12.* against stealing records.

8. In all acts making a new treason, felony, or misprision of treason peers are to have their trial by their peers, tho no special clause enacting it. *Co. P. C. cap. 27. p. 89. super statut. 1 Jac. cap. 11.* for marrying two husbands.

9. An act making any offense to be a felony, tho it speak not of accessaries before or after, yet they are impliedly contained (b).

10. Nay, altho the statute make an offense to be felony in them that commit it, their counsellors, procurers, and abettors to be felons, and speak nothing of accessaries after; yet by the opinion of my lord *Coke* receivers or accessaries after are also virtually implied, as in the statute of *Westm. 2.* in rape, *Co. P. C. cap. 19. p. 72.* upon the statute of *3 H. 7. cap. 2.* for carrying away women, *Co. P. C. cap. 12. p. 61.* upon the statute of *5 H. 4. cap. 4.* against multiplication, *Co. P. C. cap. 20. p. 74.* upon the statute of *1 Jac. cap. 12.* of witchcraft, *Co. P. C. cap. 6. p. 45. in fine,* tho *Stamford* be of another opinion (c).

11. An act, that makes an offense by name, as rape, &c. to be felony, virtually makes all that are present, aiding, and assisting principals, tho one only doth the fact, tho as to point of clergy in some cases it differs; *de quo postea.*

12. An act, which makes the offender, his counsellors and abettors guilty of felony, yet regularly makes not the counsellors, procurers or abettors principals, unless present, but, if they be absent, leaves them in the condition of accessaries before, as upon the statute of *1 Jac. cap. 12.* of witchcraft, and other statutes of that kind, unless in express words it makes them all principals, as is done by the statute of *3 H. 7. cap. 2. Co. P. C. cap. 12. p. 61.* the only instance of that kind.

(b) *Co. P. C. f. 59.*(c) *Stamf. P. C. fol. 44. b.*

13. In an act limiting a second offense to be felony, but the first only a misdemeanor, there must be two things to make the second offense felony, *viz.* 1. A judgment given for the first offense. 2. The second offense must be committed after the judgment for the first, otherwise it makes not felony, as in case of forgery upon the statute of 5 *Eliz. cap. 14. Co. P. C. cap. 75. p. 172. (d)*, and upon the statute of 1 *Fac. cap. 12. of witchcraft. Co. P. C. cap. 6. p. 46. 2 Co. Instit. p. 468.*

14. Therefore where those and some other statutes speak of a second offense after a conviction of a former, it is not intended barely of a conviction by verdict, unless judgment be given upon it. *Co. P. C. p. 46.*

15. An act making a felony and limiting it to be tried in the county, where the party is apprehended, unless there be negative words, *and not elsewhere*, is but cumulative, and he may be indicted where the offense was committed, as upon the statute of 1 *Fac. cap. 11. marrying a second husband or wife, Co. P. C. cap. 27. p. 88. and upon the statute of 7 H. 7. cap. 1. and 3 H. 8. cap. 5. soldiers departing. Co. P. C. cap. 26. p. 86, 87.*

16. A second statute enacting the same offense to be felony, that was so enacted before, with some alterations is but cumulative, and no repeal of the former act; as the statute of 3 *H. 8. cap. 5. of soldiers, making their departure without the licence of the king's lieutenant felony, (where the act of 7 H. 7. cap. 1. makes it felony, if without the captain's licence,) yet repeals not the former, because it is but an affirmative act; so 39 Eliz. cap. 4. for banishing incorrigible rogues is not taken away by 1 Fac. cap. 7. which adds burning in the shoulder, and sending them to their last habitation.*

17. If one statute be grafted upon another statute relative to it in order to the better execution of a former statute, if the former be repealed, the latter is thereby virtually repealed, as the statutes of *Labourers (e)* being repealed by 5 *Eliz. cap. 4. the statute of 3 H. 6. cap. 1. making congregations of*

8 R

masons

(d) *Vide supra. p. 685.*

(e) 23 *E. 3. cap. 1. and 25 E. 3. cap. 1.*

maſons felons is thereby repeald (*f*). *Co. P. C. cap. 35. p. 49.*

18. If a ſtatute be but temporary and diſcontinued, and then revived by a new act of parliament, or if a ſtatute be made touching a new felony, and repeald and re-enacted, the concluſion of the indictment *contra formam ſtatutorum* is good, but the beſt way is to conclude *contra formam ſtatut. in huiusmodi caſu edit. & proviſ.* with an abbreviation, becauſe in conſtruction of law it ſhall be taken either *ſtatuti* or *ſtatutorum*, which may beſt maintain the indictment in point of law (*g*).

19. A ſtatute making a new felony of an offence, that conſiſts of an act partly in the kingdom and partly out of the kingdom, and limiting it to be tried where the offence is committed, ſhall be conſtrued to be where that part of the offence is committed, that is within the kingdom, as upon the ſtatute of 1 *Fac. cap. 2.* paſſing the ſea and ſerving a foreign prince without taking the oath of obedience ſhall be tried in that county, where the part was, that he paſſed the ſea. *Co. P. C. cap. 23. p. 80.*

20. An act making a new felony extends not to an infant under the age of diſcretion, *viz.* fourteen years old; but if he be of that age, it binds him. *Plowd. Com. 465. a. Eyſton and Stud's caſe.*

21. Where the word *king* is perſonal to the then king, or extends to his ſucceſſors in acts of parliament? It is true in grants of judicial or miniſterial offices, that concern adminiſtration of juſtice, as judges or ſheriffs, a grant of ſuch an office *durante beneplacito regis* is ſimply determin'd by the king's death. 12 *Co. Rep. p. 48.* Nay the grant of a judicial office by the king *quam diu ſe bene geſſerit*, tho it be a freehold, determines by the king's death, for it is perſonal to the king that grants them; but it is held, that the grant of offices of another nature, or of lands *durante beneplacito noſtro* doth not determine

(*f*) For this laſt mention'd ſtatute recites as the ground thereof, that the congregations of maſons had violated the good effect of the ſtatutes of *Labourers*.

(*g*) But this piece of our author's

advice cannot now be obſerved, becauſe by the late acts of 4 *Geo. 2. cap. 26.* & 6 *Geo. 2. cap. 6.* all indictments, informations, &c. are required to be in words at length, and not abbreviated.

by the death of the king without some act or declaration by the successor to determine it. 12 Co. Rep. p. 48, 49.

But as touching acts of parliament, regularly the word *king* extends to his successors (*b*), and therefore the statutes of 11 H. 7. cap. 18. for service in the king's wars, 7 H. 7. cap. 1. for departing of soldiers, tho the preamble seems personal to that king, yet (it hath been ruled) do include successors, Co. P. C. cap. 26. p. 86. Dy. 211. a. so the statute of 23 H. 8. cap. 4. for brewers, Noy's Rep. p. 118. Chalchman and Wright. So Poyning's law 10 H. 7. in *Ireland* for the manner of passing acts of parliament, tho that act speak only of the *king* without *successors*, yet it extends to his successors, and so declared 3 & 4 P. & M. cap. 4. in *Hiberniâ*, 12 Co. Rep. 109.

And altho the power of altering the laws of *Wales* was a great trust reposed in H. 8. by the statute of 34 H. 8. cap. 26. for *Wales*, and was thought by some to cease by his death, 12 Co. Rep. p. 48. yet they durst not rest upon that, but it was specially repeal'd by the statute of 21 Jac. cap. 10.

A statute made to continue during the king's pleasure doth not determine by his death, unless it be specially relative to the person of the king, as *during the pleasure of the king that now is*, or according to some *dicti domini regis*, M. 24 Eliz. Moor's Rep. n. 311. p. 176. *per Mede*; and therefore it seems that in such case the successor must make some proclamation or declaration of record to determine it, before it be determin'd; as upon the statute of 8 H. 6. cap. 11. for the manner of taking apprentices in *London*, which was in truth the case in *Moore*, n. 311. but the statute of 5 Eliz. cap. 4. repealing all acts touching apprentices and labourers, and making a special provision to save the customs of *London* hath quieted that question.

By the statute of 8 H. 6. cap. 24. it is enacted, "That no *Englishman* sell to any merchant alien any merchandize, but for ready payment." By the statute of 9 H. 6. cap. 2. it is enacted, "That notwithstanding the former statute they may sell for six months time, and this ordinance shall endure so long as shall please the king." It is held 10 H. 7. 7. b. that

(b) *Vide supra* p. 100.

that this statute remains as a suspension of the former act of 8 H. 6. notwithstanding the death of *Henry VI.* till repealed by proclamation by his successor.

And yet in case of capital offenses limited and *de novo* enacted by act of parliament to continue during the king's pleasure it is not safe to proceed upon them after the king's death, and tho in matters of misdemeanors such continuance is limited by acts of parliament, yet I do not remember any such kind of limitation in acts enacting capital offenses, but they are either perpetual or limited to continue for a time certain, as seven years, &c. or till the end of the next session of parliament, &c.

22. An act of parliament, that makes an offense felony, doth consequently introduce the punishment of concealing, that is, misprision of felony; and every offense made felony by act of parliament includeth misprision, and the party may be indicted of misprision of felony, and thereupon fined and imprisond, 2 R. 3. 10, 11. And yet in *Co. P. C. p. 133.* upon the statute of 33 H. 8. cap. 1. of false tokens, it is said *where a corporal punishment only is inflicted by act of parliament, the party cannot be fined and imprisond*, which is to be understood with two cautions, *viz.* 1. Where the indictment, &c. is grounded for the same offense containd in the statute, and therefore it crosseth not the case of 2 R. 3. for there he was indicted for *misprision*, and not for *felony*. 2. Where it was an offense at common law, there if the indictment be grounded barely at common law, he may be fined and imprisond, tho the statute limit a corporal punishment, as in case of false tokens he may be indicted as a cheat. (*)

(*) Here our author had wrote the title of another chapter *Touching piracy*, but did not proceed in it, perhaps because he had referd what he thought needful to be said on that head to the chapter of *clergy*, Part II. cap. 50.

Addenda in Notis.

Ad p. 270. l. 19. Rot. Parl. 11 H. 6. n. 43. A Roy nostre Sovereigne Seigneur Besechen humbly your communes of this present parlement, that where one *John Carpenter* of *Bridham* in the shire of *Suffex* husbandman, the vii day of *Feverer* the yere of youre noble reigne the viii, saying to *Isabell* his wyff, that was of the age of xvi yere, and hadde be married to hym but xx dayes, that they wold goo togedre on pilgrimage, and made to arraye hir in hir best arraie, and toke hir with hym from the said toune of *Bridham* to the toune of *Stoughton* in the said shire, and there with woode he smote the said *Isabell* his wiff on the hede that the brayne wende oute, and with his knyff gaf hir many other dedly woundes, and streped hir naked out of hir clothes, and toke his knyff and slytte hir belly from the brest doune, and toke hir bowels oute of hir body, and loked if she were with child. And thus the said *John* murdrid horribly his wiff, of the which horribly murdre the *Thursday* next after the fest of *Seint Ambrose* the bishop, the yere of youre reigne by foreseid, the said *John* was endited byfore Sir *John Bobun* Knyght, Sir *Henry Husee* Knyght, and *William Sydney* your commissioners of your pees withinne the shire foreseid, and processe made out upon the same enditement according to your lawes rill the same *John Carpenter* was outlawed of the said mourdure, and now graciously for the same cause arreste, and in your prisone called the king's bench: Please hit to youre hie right wisenesse to considere the horrible murdre foreseid, and by aucto-rite of this your hie court of parliament to ordeine, that the said *John Carpenter* may be juged as a traytour, and that your jugges have power to geve judgement upon him to be drawed and hanged as a traytour, in eschewing of such horrible mourdurs in tyme comyng, saying allwayes to the lords of the see eschetes of his landes after yere, day and wast.

Pur ceo qil semble encontre la libertee de Seint Elgise, le Roy s'advijera.

Ad p. 384. l. 6. after *electa r. scripture sacre contraria*, for so *Grosted* expressed himself, altho these words are omitted in our author's M S. See *Mat. Paris*, p. 874.

Ad p. 396. not. (n) in fine. The truth is, the writ for burning *Saxetre* was indeed a special act of parliament made for that purpose, for so is a writ *teste'd per regem & concilium in parlamento* to be intended. See the prince's case, 8 Co. Rep. fol. 19. a. Nor do I find any footsteps of heresy being punished capitally before this statute and that of 2 H. 4. The notion that the writ *de heretico comburendo* lay at common law seems to be a mistake, for tho that writ be in the printed register, yet it is not in the ancient manuscript registers; see *Statè Tr. Vol. II. p. [275]*. That this was not the ancient punishment of heretics in *England*; see *Mat. Paris. p. 105.* for *Bracton [Lib. III. de coronâ cap. 9.] Britton [cap. 9] Fleta [Lib. I. cap. 29 & 37]*. speak not of heretics, but of Apostates and infidels: And tho by the imperial law some particular heresies were punishable with death; see *Cod. Lib. I. tit. 5. l. 11, 12, &c.* yet it does not appear, that even in the empire heresy in general was punished capitally, till the constitution of *Frederic II.* about the year 1234. which indistinctly adjudges all heretics to the flames; but in *England* the usual punishment seems to have been imprisonment, and even this was not allowable, tho he were *hereticus contumax*, before the pretended statute of 5 R. 2. without the king's special license, an instance whereof is in *Rymer's Fœdera*, Tom. VI. p. 651. *Rex venerabili episcopo Londoniæ salutem. Quia accepimus per inquisitionem vestram, quod Nicholaus de Drayton ——— coram vobis congruè convictus & pro heretico adjudicatus existit, quodque in suo errore nephando animo indurato nequiter perseverans, ad fidei catholice unitatem redire non curavit nec curat in presenti, licet sæpius ad hoc excitatus & inductus, sententiam majoris excommunicationis in hac parte incurrendo, Cum igitur sancta mater ecclesia ita tales hereticos persequitur, nè suo veneno alios inficiant, ut in carceribus custodiri præcipiat. Super quo nobis supplicastis, &c. Nos supplicationi vestre prædictæ gratianè concedentes, ad ipsum Nicholaum hereticum carcerati custodia vestre mancipare, & ipsum in carcere vestro custodire faciendum, quousque dictum errorem suum revocaverit, & ad fidei catholice unitatem redire veluerit, quantum*

quantum in nobis est, licentiam concedimus specialem. Rot. Pat. 44 E. 3. p. 1. m. 23. dorso.

Ad p. 490. in fine. Placita coram iusticiariis itinerantibus apud crucem lapideam in com. Midd. anno 2 E. 1. incipiente 3. Rot. 13. in dorso. Seyton Alice de Covale was arraigned pro morte Johannis Lipertung, and pleaded, that she killed him *se defendendo*, eò quòd burgavit domum suam; & de bono & malo ponit se super patriam; & xii juratores dicunt, quòd prædicta Alicia occidit prædictum Johannem se defendendo, eò quòd voluit domum suam burgasse, & ipsam occidisse, si posset. Ideò inde quieta. Et catalla prædicti Johannis confiscantur." *Placita eoram eisdem iustic. ibidem. Rot. 12. in dorso.* Thomas le Chapeleyn nequiter, & in feloniam, fregit ostium domus Isabellæ Lucas de Bottewell. Hue and cry was raised, and he was pursued, and killed in fugiendo by one William le Favene. Favene brought the king's pardon pro morte illâ, "Ideò conceditur ei firma pax, & quia prædictus Thomas le Chapeleyn occisus fuit in fugiendo, catalla ejus confiscantur.

Ad p. 508. l. 15. comes into the dwelling-house, but as the case is reported in *Kel. 31.* he was indicted for breaking into the house. *Vide infra Part II. p. 358.*

Ad p. 566. l. ult. H. 7 E. 2. Rot. 88. This was the case of Thomas de Hedersete and John de Upstone, who being convicted eò quòd incendium & combustionem domorum villæ de Lenne ex præcogitata malitiâ felonice perpetrarunt, had judgment quòd suspendantur.

Ad p. 602. M. 28 E. 3. Rot. 32. The abbot of St. Albans was impleaded coram rege, pro evasione prisonum à gaolâ de Sancto Albans, cujus custodiam idem Abbas habet, ut de jure abbathie suæ; amongst whom was John de Heremyngford a clerk convicted; but upon the jury's finding, "quòd idem Johannes de Heremyngford tempore evasione prædictæ, seu aliquo momento ante recaptionem ejusdem, non fuit extra visum custodis dictæ gaolæ sub prædicto Abbate, consideratum est, quòd prædictus Abbas eat inde quietus.

M. 45 E. 3. Rot. 17. This was the case of William Bakere, who was taken cum bonis & catallis furatis by the constables of Danbury, and set in the flocks, from whence he escaped; upon which the said constables were brought

coram rege ad respondendum, &c. and pleaded, "quòd postquam latro ceppos fregit, ipsi eum recenter insecti fuerunt, visum super ipsum semper habentes," till they retook him, and committed him to the gaol of the said town; "et quòd prædictus latro adhuc in eadem gaolâ existit, &c." The king's attorney replied, and joined issue with them, as to their keeping constant view of him till he was retaken. "Et juratores dicunt, quòd prædictus latro arrestatus & captus fuit per eosdem constabularios, & in ceppis positus, & quòd iidem constabularii prædictum latronem postea permiserunt evadere, absque hoc quòd ipsi habuerunt visum super præfatum latronem in evadendo, prout ipsi superius allegarunt. Ideò consideratum est, quòd prædicti constabularii erga dominum regem de contemptum solidis pro evasione prædictâ onerentur.

Ad p. 621. Mich. 7 R. 2. Rot. 3. This was the case of John, Vicar of Round Church in Cambridge, who was indicted, that whereas one William Gore an approver, prisoner in the castle of Cambridge, "laicus erat tempore captionis corporis sui, jam per assensum, & licentiam gaolarii, & janitoris ibidem, irruditus [eruditus] est, & informatus de lecturâ [literaturâ] per eundem vicarium, &c." Upon this indictment the vicar surrendered himself coram rege, and was arraigned de feloniam prædictâ, and pleaded not guilty. The court bailed him till his trial, which was before the judges of nisi prius at Cambridge, where the jury found, "Quòd prædictus Johannes vicarius in nullo est culpabilis de feloniam, nec de aliquibus articulis sibi impositis, nec unquam se eâ occasione retraxit. Ideò consideratum est, quòd eat inde quietus.

Ad p. 677. The reason why I say *prest* must now be understood in the active sense, is because, tho it be vulgarly used in a passive signification for being taken away by compulsion, yet in legal understanding it cannot now be applied to any to make him a listed soldier, and subject to penalties as such, unless he actively do somewhat, as taking earnest, or the like, whereby he voluntarily consents to his being listed, and so amounts to the same as taking *prest*.

Ad p. 695. The statute of 1 Jac. cap. 12. against conjuration, witchcraft, &c. is lately repealed by an act of this present parliament, viz. 9 Geo. 2. cap. 5.

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